82-1604

No. - .

In the Supreme Court of the United States.

OCTOBER TERM, 1982.

RICHARD DEWEY,
PETITIONER,

v.

THE UNIVERSITY OF NEW HAMPSHIRE, ET AL.,
RESPONDENTS.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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Questions Presented.

1. Did the First Circuit Court of Appeals err in applying to the dismissal for failure to state a claim of the civil rights complaint in this case a standard of review more stringent, (a) than that which it would apply to other, non-civil rights cases, (b) than that which would be applied in other circuits, and (c) than what is called for under the Federal Rules of Civil Procedure and in *Conley* v. *Gibson*, 355 U.S. 41 (1957)?

2. Did not the First Circuit Court of Appeals so far depart from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision, where the numerous paragraphs in the complaint of the petitioner, construed as they must be in the light most favorable to him, set forth sufficient allegations to state claims for relief even under the more stringent standard of review for civil rights cases applied by the First Circuit Court of Appeals?

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Opinions Below.

The opinion of the Court of Appeals (*infra* at 3a) is reported at 694 F.2d 1 (1st Cir. 1982). The opinion of the district court (*infra* at 31a) is not reported.

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*The other parties to this case are respondents Allan Spitz, Eugene S. Mills, Murray Straus, Stuart H. Palmer, Evelyn E. Handler, Gordeon A. Haaland, and Roland Kimball.

Jurisdiction.

The judgment of the Court of Appeals (*infra* at 2a) was entered on November 26, 1982. A petition for rehearing was denied on December 28, 1982 (*infra* at 14a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

Constitutional and Statutory Provisions Involved.

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government of a redress of grievances.

The Fourteenth Amendment to the United States Constitution provides:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> SECTION 2. Representatives shall be apportioned among the several States according to their respective

numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss of emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

28 U.S.C. § 1254(1) provides:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1988 provides:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against

law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 USCS §§ 1981-1983, 1985, 1986], title IX of Public Law 92-318 [20 USCS §§ 1681 et seq.], or title VI of the Civil Rights Act of 1964 [42 USCS §§ 2000d et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. § 2000e-6(a) provides:

(a) **Complaint.** Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this title [42 USCS §§ 2000e et seq.], and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

Rule 1 of the Federal Rules of Civil Procedure provides:

> These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

Rule 2 of the Federal Rules of Civil Procedure provides:

> There shall be one form of action to be known as "civil action".

Rule 8 of the Federal Rules of Civil Procedure provides:

> **(a) Claims for Relief.** A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.
>
> **(b) Defenses; Form of Denials.** A party shall state in short and plain terms his defenses to each claim asserted and shall admit to deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith

to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but, when he does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, he may do so by general denial subject to the obligations set forth in Rule 11.

(c) Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

(d) Effect of Failure to Deny. Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

(e) Pleading to be Concise and Direct; Consistency.

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal, equitable, or maritime grounds. All statements shall be made subject to the obligations set forth in Rule 11.

(f) **Construction of Pleadings.** All pleadings shall be so construed as to do substantial justice.

Statement of the Case.

Petitioner Richard Dewey was formerly a tenured professor of sociology at the University of New Hampshire, whose faculty he joined in 1958. Petitioner turned 65 years of age during the fall semester of the academic year 1977-1978, and was informed at that time by the then Dean of the College of Liberal Arts, Allan Spitz, that he would have to retire at the end of that academic year, because of University policy regarding retirement at that age. Thus, petitioner did not receive, as he had for the previous twenty years, a letter informing him of his appointment as a faculty member for the next, or any succeeding, academic year. Petitioner did not wish to be retired and, at the behest of various University officials, sought until March of 1981 to appeal his retirement through certain informal University administrative channels, rather than filing suit.

Having pursued these avenues without success, petitioner on July 29, 1981 filed an action in the United States District

Court for the District of New Hampshire against defendant University and several of its past and present administrators, seeking declaratory and injunctive relief and damages for violation of his First Amendment rights, and his rights to due process and equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States.

In Count I of his complaint, as amended (*infra* at 15a), petitioner contended that the position taken regarding his retirement was substantially motivated out of retaliation for past exercises by him of his First Amendment rights, and that the policy reason cited by Dean Spitz for said retirement was in fact a pretext. In Count II, petitioner submitted that even if the decision to retire him was in fact based on University policy, said decision violated his Fourteenth Amendment right to equal protection of the laws, inasmuch as the policy itself contained an age classification not rationally related to any legitimate state interest. In Count III, petitioner submitted that his right to equal protection had been further violated in that his forced retirement was no different from the dismissal of a tenured faculty member who would have been afforded, as petitioner was not, a host of procedural safeguards at the time of such dismissal. In Count IV of said complaint, as amended, petitioner contended that his interest in liberty under the Fourteenth Amendment had been deprived without due process of law via the University's deletion of his name from all University publications. In Count V, petitioner alleged that he had been, and was being, denied equal protection of the laws in that the University and its officials arbitrarily and irrationally had treated, and were continuing to treat, other similarly situated individuals far more favorably with regard to opportunities for extended employment and employment after retirement. Finally, in Count VI, petitioner alleged that his Fourteenth Amendment rights to due process and equal protection had been denied in connection with the level of

salary he received from the academic year 1967-1968 on, especially with regard to the unprecedentedly low raise he received in his last year of employment.

On August 21, 1981, defendants filed a motion to dismiss complaint and/or for summary judgment wherein they claimed, *inter alia*, that each of the six counts of petitioner's complaint ought to be dismissed under Rule 12(b)(6) of the Federal Rules of Civil Procedure for alleged failure to state a claim upon which relief could be granted, and that Counts II, III, V, and VI should be dismissed under Rule 12(b)(1) for alleged lack of jurisdiction over the subject matter by reason of statute of limitations. During the succeeding months, petitioner filed a motion to compel production of documents for inspection and copying and a motion for further discovery under Rule 56(f) seeking discovery in the form of depositions and further documents, both to enable him to present facts essential to justify his objection to defendants' motion. Defendants objected to both motions.

During these months, the judge to whom the case had been assigned was afflicted by a stroke, and Judge Andrew A. Caffrey of the District of Massachusetts was assigned the case by designation. A hearing was finally held on February 11, 1982, regarding petitioner's pending discovery motions before the magistrate for the New Hampshire District, who on February 16, 1982, decided that the hearing on defendants' motion already scheduled for March 2, 1982, should proceed only on those aspects of the motion relating to dismissal. Petitioner's motions were therefore denied without prejudice at that time. Hearing on defendant's motion, so limited, was held before Caffrey, J., sitting by designation, on March 2, 1982, at which time the parties presented opposing memoranda of law (with defendants filing a memorandum revised to reflect said limitation). Petitioner was allowed to file an amended complaint (*infra* at 15a). Thereafter, pursuant to leave granted by the

court, the parties filed supplemental memoranda, and petitioner filed a motion for leave to further amend complaint (*infra* at 28a), which was granted over defendants' objection, in part to address a question posed by the court to petitioner's counsel at the March 2 hearing.

On May 19, 1982, the district court, Caffrey, J., issued a memorandum and order (*infra* at 31a) in accordance therewith dismissing Counts I and IV of petitioner's complaint, as amended, for failure to state a claim for relief, and dismissing Counts II, III, V, and VI thereof for lack of subject matter jurisdiction as time barred by reason of statute of limitations.

Petitioner appealed the district court's dismissal of Counts I, II, III, V, and VI to the First Circuit Court of Appeals. On November 26, 1982, the First Circuit issued an opinion (*infra* at 3a) affirming the district court. In so doing the First Circuit agreed with the trial court that the allegations in Count I were too conclusory to state a claim for relief under its more stringent standard of pleading for civil rights cases, but noted that the case posed a close issue on a motion to dismiss (*infra* at 6a, 9a). As to Counts III, V and VI (where Count VI dealt with petitioner's salary in his last year of employment), however, the First Circuit did not reach the statute of limitations question, affirming dismissal instead upon its finding that the allegations in those counts were similarly too conclusory to state claims for relief. Petitioner filed a petition for rehearing which was denied on December 28, 1982 (*infra* at 14a).

Reasons for Granting the Petition.

This case presents the important question whether a Court of Appeals, here the First Circuit, may single out a particular class of cases, here civil rights cases, and impose upon them

a more stringent standard for pleading than that which is required under the Federal Rules of Civil Procedure.

I. It was Error for the First Circuit to Apply to This Civil Rights Case a Standard of Review More Stringent than That which it Would Apply to Other Types of Cases, or than That which Other Circuits would Apply.

It has long been recognized that the function of pleadings under the Federal Rules is to give fair notice of the claim asserted. 2A Moore's Federal Practice (2d ed. 1982), ¶8.13 at 8-103. Consistent with that function, all that is required is a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2). And "each averment of a pleading shall be simple, concise, and direct." Fed.R.Civ.P. 8(b). In line with the Federal Rules' objective of administering substantial justice in the simplest form and at the least expense, the true test for sufficiency of a pleading is therefore whether it "gives fair notice and states the elements of the claim plainly and succinctly, and not whether as an abstract matter it states 'conclusions' or 'facts'." 2A Moore's Federal Practice (2d ed. 1982), ¶8.13 at 8-111. Indeed, there is no requirement that the pleading state "facts." *Id.* at 8-101. *See, Conley* v. *Gibson*, 355 U.S. 41, 47-48 (1957).

Under the Federal Rules of Civil Procedure, there is only one form of action known as "civil action" and the Rules govern procedure in all suits of a civil nature. Fed.R.Civ.P. 2 and 1 respectively. Thus, with the exception of special pleading provisions such as Rules 9(b) (as to fraud or mistake) and 71A (c)(2) (as to condemnation of property), "the general rules of pleading envisioned by Rule 8 apply to all types of claims." 2A Moore's Federal Practice, ¶8.17 at 8-145. "In all respects the normal federal rule pleading standards apply to civil rights actions." 5 Wright & Miller, Federal Practice and Procedure (1969) § 1230 at 174-175 (footnote omitted).

Entirely out of line with the modern philosophy of notice pleading embodied in the Federal Rules of Civil Procedure, the Court of Appeals for the First Circuit within the last few years has been developing a standard of review, confined exclusively to civil rights cases, that represents a return to the type of pre-Rules code pleading described in 2A Moore's Federal Practice ¶8.12 at 8-89 through 8-97

> Our standard for such a review as this has crystallized over the past few years in a number of cases. We require more than conclusions or subjective characterizations. We have insisted on at least the allegation of a minimal factual setting. It is not enough to allege a general scenario which could be dominated by unpleaded facts, *O'Brien* v. *DiGrazia*, 544 F.2d 543, 546 n.3 (1st Cir. 1976); nor merely to allege without specification that defendants used their powers generally with respect to various governmental bodies to plaintiff's prejudice, *Kadar Corp.* v. *Milbury*, 549 F.2d 230 (1st Cir. 1977); nor to allege in general terms termination of a job because of plaintiff's refusal of romantic advances made by a superior, *Fisher* v. *Flynn*, 598 F.2d 663 (1st Cir. 1979); nor to allege simply that plaintiff suffered an adverse prison decision because he had filed a complaint on unspecified matters in court, *Leonardo* v. *Moran*, 611 F.2d 397 (1st Cir. 1979); nor, finally, to allege that one's constitutional rights had been violated by some undescribed surveillance, *Glaros* v. *Perse*, 628 F.2d 679 (1st Cir. 1980).
>
> We recognize the great utility of 42 U.S.C. § 1983 as an instrument of justice in the hands of the weak against the mighty, but we also are aware of the impact of its misuse. Therefore, although we must ask whether the "claim" put forward in the complaint is capable of being supported by

> any conceivable set of facts, we insist that the claim at least set forth minimal facts, not subjective characterizations, as to who did what to whom and why.

Dewey v. *University of New Hampshire*, 694 F.2d 1, 3 (1st Cir. 1982). The First Circuit upheld the dismissal of Counts I, IV, V and VI of petitioner's complaint based on this standard, characterizing same as presenting a "skeletal set of bland allegations." *Id.* at 4. Because, for the reasons set forth hereinafter, this case does not suffer from the defects found in the above civil rights cases, and is admittedly a "close" case (*infra* at 6a, 9a), it represents the outermost limit to which the First Circuit has extended its more stringent standard. The First Circuit takes comfort in citing holdings from four other circuits that have on occasion expressed similar demands for more particularized facts in civil rights cases. *Dewey*, *supra*, 694 F.2d at 3. However, this does not change the fact that "the majority of the cases do not subscribe to the theory that greater specificity in pleading is called for in civil rights cases," or that the position of circuits such as the Third, which is echoed by the First Circuit in this case, has not achieved widespread acceptance. 2A Moore's Federal Practice ¶8.17 [4.-1] at 8-176 through 8-178.

As quoted above, the reason for the First Circuit's insistence on the inclusion of "minimal" facts in complaints under 42 U.S.C. § 1983 is grounded upon the "impact of [that sections's] misuse." The 1968 case of *Valley* v. *Maule*, 297 F. Supp. 958, 960-961 (D. Conn. 1968) elaborates upon this impact as follows:

> As a general rule notice pleading is sufficient, but an exception has been created for cases brought under the Civil Rights Acts. The reason for this exception is clear. In

> recent years there has been an increasingly large volume of cases brought under the Civil Rights Acts. A substantial number of these cases are frivolous or should be litigated in the State courts; they all cause defendants — public officials, policemen and citizens alike — considerable expense, vexation and perhaps unfounded notoriety. It is an important public policy to weed out the frivolous and insubstantial cases at an early stage in the litigation, and still keep the doors of the federal courts open to legitimate claims.

However true that perceived impact may be in particular cases, it is the role of the Congress which enacted 42 U.S.C. § 1983, and not of the courts, to decide whether a more stringent standard should be applied to pleadings in federal civil rights cases. *Cf.*, *United States* v. *Gustin-Bacon Division, Certain-Teed Products Corp.*, 426 F.2d 539, 542 (10th Cir. 1970), *cert. denied*, 400 U.S. 832 (1970) (no suggestion in the Civil Rights Act of 1964 to support the trial court's particular interpretation of 42 U.S.C. § 2000e-6(a) that in effect would have reinstated the type of fact pleading eradicated by the Federal Rules). In this regard, it is significant that Congress' most recent act affecting 42 U.S.C. § 1983, *i.e.*, the enactment of 42 U.S.C. § 1988, The Civil Rights Attorney's Fees Awards Act, was geared toward *encouraging* enforcement of civil rights, rather than stemming the tide, as is the First Circuit's design. *See*, Senate Report No. 94-1011, at 2, reprinted in 5 U.S. Code Cong. & Ad. News (1976) at 5909-5910. In sum, it was error on the part of the First Circuit to apply to this civil rights case a standard of review more stringent than that which it would apply to other types of cases, and than that which other circuits would apply to this case.

II. The First Circuit, even Under its Own More Stringent Standard for Pleading in Civil Rights Cases, has so Far Departed from the Usual Course of Judicial Proceedings in this Case as to Warrant this Court's Exercise of its Power of Supervision.

Under any standard of review, including that imposed by the First Circuit here, the numerous allegations in Counts I, III, V, and VI should have been found sufficient to state claims for relief. The Court of Appeals therefore so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Reversing the First Circuit in the recent case of *Gomez* v. *Toledo*, 446 U.S. 635, 640 (1980), this Court has stated that:

> By the plain terms of § 1983, two — and only two — allegations are required in order to state a cause of action under that statute. First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law.

Count I, the primary count of petitioner's complaint, concerns his claim that the real reason for his being forced to retire was not the on-paper policy of the University regarding retirement at age 65, but rather the retaliation by a key official against him for his past exercises, both publicly and privately, of his First Amendment rights concerning University matters of public concern. *Perry* v. *Sindermann*, 408 U.S. 593 (1972); *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977); *Givhan* v. *Western Line Consolidated School District*, 439 U.S. 410 (1979). The following are the

paragraphs in the petitioner's amended complaint, with reference to the pages in the appendix wherein they appear, that set forth all elements necessary to state a claim under the aforementioned cases.

> 15. Defendant Allan Spitz served as Dean of the College of Liberal Arts at the University from June of 1971 to July of 1980. (*Infra* at 18a.)
>
> 16. During those years, both publicly and to defendant Spitz in person, Professor Dewey voiced views on University matters of public concern that were contrary to those of defendant Spitz. (*Infra* at 29a.)
>
> 17. These expressions of views by plaintiff constituted conduct that is constitutionally protected by the First Amendment of the Constitution of the United States. (*Infra* at 18a.)
>
> 13. During the fall semester of the academic year 1977-78, [when plaintiff turned] sixty-five years of age . . . 14. [defendant Spitz] was the University official responsible for making the decision in the first instance with regard to plaintiff's retention. (*Infra* at 18a.)
>
> 18. In the Fall of 1977 defendant Spitz, acting under color of state law, issued a tersely worded decision that plaintiff would have to retire at the end of the 1977-78 academic year because of University policy regarding retirement at the age of 65. (*Infra* at 18a.)
>
> 20. The reason cited by defendant Spitz for his decision was a mere pretext; a substantial factor in his decision was plaintiff's past exercise of his right of freedom of speech guaranteed by the First Amendment and incorporated by the Fourteenth Amendment to the Constitution of the United States. (*Infra* at 19a.)
>
> 21. In so deciding, a defendant Spitz acted knowingly, maliciously, and out of retaliation against the aforemen-

tioned exercise by plaintiff of his First Amendment rights. (*Infra* at 19a.)

14. In keeping with the country-wide momentum to abolish age as a job criterion, plaintiff found widespread support for his retention among the University community, with the exception of Allan Spitz. (*Infra* at 31a.)

25. Had defendant Spitz not taken the knowing, malicious, and impermissibly motivated action that he did in deciding to retire plaintiff, the University policy regarding retirement at the age of 65 would not have been applied in plaintiff's case by the administration at the University. (*Infra* at 19a.)

26. There were at least three tenured professors who reached the age of 65 during the academic years 1977-78 and 1978-79, but only the plaintiff was forced to retire by the University. Consequently, plaintiff was the only tenured professor to have been mandatorily retired between the time of passage by the Congress of the United States of the Age Discrimination Act Amendments of 1978 and when the University formally abolished mandatory retirement in 1979. (*Infra* at 29a.)

Under the on-paper policy contained in the September 1976 Faculty Handbook of the University of New Hampshire, employment of a faculty member could be extended beyond the normal retirement age of 65 under rare and unusual circumstances and at the discretion of the University. As explained to the First Circuit both at oral argument and in the petition for rehearing filed by petitioner, the thrust of petitioner's amended complaint is that the entire on-paper policy of the University regarding retirement, including its discretionary "rare and unusual circumstances" test, was in fact no longer being observed at the time of petitioner's forced retirement. Taking

as admitted the above material allegations of Count I and construing the complaint liberally in favor of petitioner, as is required under the long established standard of *Jenkins* v. *McKeithen*, 395 U.S. 411, 421 (1969), it cannot honestly be said that it appears beyond doubt that petitioner can prove no set of facts in support of his claim that would entitle him to relief. *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957). Petitioner submits that even under the peculiar standard applied by the First Circuit to civil rights cases, the above allegations of Count I were not so bland or so devoid of minimum factual setting as to warrant the sanction of dismissal imposed in *O'Brien* v. *DiGrazia*, 544 F.2d 543 (1st Cir. 1976); *Kadar Corp.* v. *Milbury*, 549 F.2d 230 (1st Cir. 1977); *Fisher* v. *Flynn*, 598 F.2d 663 (1st Cir. 1979); *Leonardo* v. *Moran*, 611 F.2d 397 (1st Cir. 1979); and *Glaros* v. *Perse*, 628 F.2d 679 (1st Cir. 1980). The complaint here does not seek expansion of limited constitutional concepts as did the invasion of privacy claims of the plaintiffs in *O'Brien*. And unlike *Kadar* and *Glaros* there is specification here as to what defendant Spitz did and what motivated him to do so. Moreover, there is no ambiguity here about defendant Spitz's motivation, as there was about that of the defendants in *Leonardo*. Similarly, petitioner's amended complaint does not suffer from the critical defects found in the complaint in *Fisher*, who charged sex discrimination in the termination of her employment as an assistant professor of sociology. Fisher failed to plead critical "but for" causation allegations to indicate a sufficient nexus between her refusal to accede to the romantic overtures of her department's chairman and her termination: she failed to allege that the chairman had the authority to terminate her employment or effectively recommend the same or that he had some input in the decision to terminate her. Clearly, the above quoted paragraphs from petitioner's amended complaint specify the actor involved, his impermissible motiva-

tion, and his ability and authority to act upon that motivation to petitioner's detriment.

Similarly, Counts III, V, and VI (with respect to petitioner's last year of employment) should have been considered to be sufficient to state claims had the First Circuit viewed their allegations in an acceptable light. Under the First Circuit's own logic, the allegations in Count III, dealing with the lack of procedural safeguards afforded petitioner upon his forced retirement, would be considered sufficient if Count I were found to be so. *Dewey, supra*, 694 F.2d at 5. And with respect to Count V (dealing with the unequal treatment of petitioner from others similarly situated in connection with extended employment and employment after retirement) and Count VI (dealing with the lowest raise of all full professors given to petitioner in his last year of employment, contrary to the longstanding custom of the University), were petitioner required to include in his pleadings the degree of factual detail demanded by the First Circuit, his complaint would have to have been so prolix as to violate Rule 8 (a)(2)'s requirement of a short and plain statement. Certainly, if such detail were deemed necessary to give notice to the opposing party in order to form an answer or reply, such "may be gained through a motion for a more definite statement under Rule 12(e); by means of discovery under Rules 26-35, and 45; by moving for summary judgment under Rule 56; or through the pre-trial conference procedure of Rule 16." 2A Moore's Federal Practice ¶8.17 (1) at 8-146 through 8-147 (footnotes omitted).

As this Court stated in *Conley* v. *Gibson*, 355 U.S. 41, 47-48 (1957), where race discrimination was at issue:

> The respondents also argue that the complaint failed to set forth specific facts to support its general allegations of discrimination and that its dismissal is therefore proper. The decisive answer to this is that the Federal Rules of Civil Procedure do not require a claimant to set out in

> detail the facts upon which he bases his claim. To the contrary, all the Rules require is "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. The illustrative forms appended to the Rules plainly demonstrate this. Such simplified "notice pleading" is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues. Following the simple guide of Rule 8(f) that "all pleadings shall be so construed as to do substantial justice," we have no doubt that petitioners' complaint adequately set forth a claim and gave the respondents fair notice of its basis. The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.

The First Circuit's holding in this case signals a return to code pleading and to the very game of skill approach rejected by the Federal Rules of Civil Procedure and by this Court. Set forth in Appendices E & F to this petition for this Court to examine, are the numerous allegations in Counts I, III, V, and VI which the First Circuit found to be too "conclusory" to state claims for relief. Petitioner submits that after examining same, this Court should find that the First Circuit, even under its own more stringent standard for pleading in civil rights cases, has so far departed from the usual course of judicial proceedings as to warrant this Court's exercise of its power of supervision.

Conclusion.

For the foregoing reasons, petitioner respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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Exeter, New Hampshire 03833.
(603) 778-8535

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GENERAL DOCKET

United States Court of Appeals

FOR THE FIRST CIRCUIT

CASE No. 821486.

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Dec. 28	Order (Coffin, Timbers and Breyer, J.J.) denying petition for rehearing. Notices mailed. (jmo)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE
81-372-(L)C

1982	
Feb. 28	(23) Plaintiff's amended complaint
March 12	(27) Plaintiff's motion for leave to further amend complaint (Motion allowed, Caffrey, J., 3-3-82)
May 20	(30) Memorandum, Caffrey, J., Sitting by Designation
May 20	(31) Order, Caffrey, J. (count I dismissed for failure to state a claim for relief; count II, III, V and VI dismissed for lack of subject matter jurisdiction; count IV dismissed for failure to state a claim for relief)

United States Court of Appeals

FOR THE FIRST CIRCUIT

No. 82-1486.

RICHARD DEWEY,
Plaintiff, Appellant

v.

THE UNIVERSITY OF NEW HAMPSHIRE, ET AL.,
Defendants, Appellees.

JUDGMENT

Entered November 26, 1982

This cause came on to be heard on appeal from the United States District Court for the District of New Hampshire, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:

/s/_____
Dana H. Gallup *Clerk.*

[cc: Messrs. Gearreald and Millimet.]

United States Court of Appeals

For the First Circuit

No. 82-1486

RICHARD DEWEY,
Plaintiff, Appellant,

v.

THE UNIVERSITY OF NEW HAMPSHIRE, ET AL.,
Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

[Hon. Andrew A. Caffrey,* *U.S. District Judge*]

Before

Coffin, *Chief Judge*,

Timbers,** *Senior Circuit Judge*,

and Breyer, *Circuit Judge*.

Mark S. Gearreald, with whom *Shute, Engel & Morse, P.A.* was on brief, for appellant.

Joseph A. Millimet, with whom *Devine, Millimet, Stahl & Branch* was on brief, for appellees.

November 26, 1982

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* Of the District of Massachusetts, sitting by designation.

** Of the Second Circuit, sitting by designation.

COFFIN, *Chief Judge.* Plaintiff Richard Dewey appeals from the dismissal of his civil rights complaint by the United States District Court for the District of New Hampshire. We agree with the district court that Count One of the complaint failed to state a claim upon which relief could be granted and that the remaining counts were time barred.[1]

Plaintiff was, from 1958 to 1978, a tenured professor at the University of New Hampshire. In 1978 he retired, pursuant to a directive invoking a University policy requiring retirement at age 65. After receiving notice of his mandatory retirement, plaintiff sought unsuccessfully to appeal the decision through informal University channels. That failing, on July 29, 1981, he brought suit, under 18 U.S.C. § 1983, against the University and several of its administrators, seeking declaratory and injunctive relief and damages for violation of his rights under the First and Fourteenth Amendments. In Count I of the complaint, plaintiff alleged that the enforcement of the retirement policy in his case was in retaliation for past exercise of his First Amendment rights. Count II alleged that, even if the retirement was based on the University's policy, the decision was a violation of the Equal Protection Clause, because it relied on an age classification not rationally related to a legitimate state interest. Count III asserted the lack of procedural safeguards that should have attended his dismissal. Count IV alleged the deprivation of a liberty interest in the deletion of his name from University publications. Count V alleged a denial of Equal Protection in that other individuals were more favorably treated regarding post-retirement employment. Count VI alleged a denial of Due Process and Equal Protection in connection with plaintiff's salary from 1967 forward.

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[1] The court also decided that Count IV failed to state a claim for relief. Plaintiff does not challenge that decision here.

Defendants moved to dismiss the complaint and/or for summary judgment. After a hearing, the receipt of memoranda of law from the parties and two amendments to plaintiff's complaint, the court dismissed the complaint. It dismissed Counts I and IV for failure to state a claim upon which relief could be granted and Counts II, III, V and VI as time barred.

Count I

The pertinent allegations of Count I were that plaintiff, who had taught at the University from 1958, aware that he would turn 65 on November 1, 1977, began in the fall term of 1977 to discuss with his colleagues "their views on ageism"; that "[i]n keeping with the country-wide momentum to abolish age as a job criterion, [he] found widespread support from his retention among the University community" except for defendant Spitz, the Dean of the College of Liberal Arts; that during all of the years of Spitz's deanship, from 1971 to 1980, plaintiff "both publicly and to defendant Spitz in person . . . voiced views on University matters of public concern[2] that were contrary to those of defendant Spitz"; that Spitz issued a decision that plaintiff would have to retire at the end of the 1977-78 academic year because of University policy; that this reason was a mere pretext, concealing that "[a] substantial factor in his decision was plaintiff's past exercise of his right of freedom of speech"; that in the three and one-half years since this decision plaintiff has appealed to the Acting Dean of the College of Liberal Arts, the Vice President for Academic Affairs, the former president of the University, the present President, and the Personnel Committee of the Board of Trustees, all of whom rejected his appeals despite "expressions of support for plaintiff's retention from all sectors of the University community".

[2]The words "of public concern" were added late in this litigation by amendment on March 12, 1982, after a district court hearing on March 2.

There must be added to these allegations the University's retirement policy, contained in the University Faculty Handbook, which the magistrate, without objection, recommended be considered by the court along with the pleadings in ruling on defendants' motion to dismiss the complaint. The Handbook contained the details of the University's retirement policy alluded to in the complaint, namely, that "[u]nder rare and unusual circumstances and at the discretion and on the initiative of the University, employment of a member of the faculty may be extended beyond the retirement age . . . ." The complaint alleged that two other 65 year old professors were retained in the 1977-78 and 1978-79 academic years, plaintiff being the only 65 year old mandatorily retired in those years.

What we have before us, therefore, is a complaint that makes three statements: (1) that plaintiff would likely have met the "rare and unusual" circumstances test because he had widespread support among the University community and two other tenured professors of his age were kept on; (2) that because he had voiced disagreement with defendant Spitz on University matters of public concern from 1971 to 1980, Spitz had made the key decision that the University should not exercise its discretion and determine that plaintiff had met the "rare and unusual" circumstances test; and (3) that top officials of the University backed up the initial decision.

The district court dismissed Count I of the complaint on the ground that it did not state a claim for which relief could be granted. This is a dubious practice in a close case, particularly one involving a First Amendment claim. Summary judgment allows a broader basis for decision, and a hearing of evidence an even broader basis. Dismissal of a claim requires the most close analysis by an appellate court, balancing the overall liberal thrust of the simplified civil rules on the one hand, *see generally* 5 *Wright & Miller, Federal Practice and Procedure*, §§ 1216, 1357, against the repeated demands by our and other

courts that there be more than conclusory allegations, even in civil rights cases.

Our standard for such a review as this has crystallized over the past few years in a number of cases. We require more than conclusions or subjective characterizations. We have insisted on at least the allegation of a minimal factual setting. It is not enough to allege a general scenario which could be dominated by unpleaded facts, *O'Brien* v. *DiGrazia*, 544 F.2d 543, 546 n.3 (1st Cir. 1976); nor merely to allege without specification that defendants used their powers generally with respect to various governmental bodies to plaintiff's prejudice, *Kadar Corp.* v. *Milbury*, 549 F.2d 230 (1st Cir. 1977); nor to allege in general terms termination of a job because of plaintiff's refusal of romantic advances made by a superior, *Fisher* v. *Flynn*, 598 F.2d 663 (1st Cir. 1979); nor to allege simply that plaintiff suffered an adverse prison decision because he had filed a complaint on unspecified matters in court, *Leonardo* v. *Moran*, 611 F.2d 397 (1st Cir. 1979); nor, finally, to allege that one's constitutional rights had been violated by some undescribed surveillance, *Glaros* v. *Perse*, 628 F.2d 679 (1st Cir. 1980).

We recognize the great utility of 42 U.S.C. § 1983 as an instrument of justice in the hands of the weak against the mighty, but we also are aware of the impact of its misuse. Therefore, although we must ask whether the "claim" put forward in the complaint is capable of being supported by any conceivable set of facts, we insist that the claim at least set forth minimal facts, not subjective characterizations, as to who did what to whom and why. In so requiring, we are not alone. At least four other circuits keep us company: *United States* v. *City of Philadelphia*, 644 F.2d 187 (3d Cir. 1980); *Cohen* v. *Illinois Institute of Technology*, 581 F.2d 658 (7th Cir. 1978); *Anderson* v. *Sixth Judicial District Court*, 521 F.2d 420 (8th Cir. 1975); *Albany Welfare Rights Organization Day Care Center, Inc.* v. *Schreck*, 463 F.2d 620 (2d Cir. 1972).

In the instant case the complaint alleges that plaintiff, over a period of six years prior to the critical decision in the fall of 1977, spoke on a number of issues of public interest involving the University, disagreeing with defendant Spitz. Despite the fact that nearly eight months elapsed from the filing of the complaint (July 29, 1981) to the filing of a second motion to amend it (March 12, 1982), during which time the lack of specificity in the complaint had been vigorously challenged, there was no effort to fill in the gaps as to the nature of the issues discussed, the particular occasions, their recentness or remoteness, the position of the University, the importance of the controversy, the prominence or lack of prominence of plaintiff's comments. Instead, the allegations described what we assume would be true of any thinking and reasonably articulate faculty member during the decade of the seventies.

If such a skeletal set of bland allegations were held to state a cause of action, any employee could put a defendant to its proof or at least force it to affidavits simply by saying: "Over the past ten years my immediate superior and I have talked about various issues of public interest concerning the company (college, agency, store). Occasionally I disagreed with him. This is why I wasn't kept on the payroll." Such a conclusory charge of retaliation for wholly unidentified talk would be a cheap way of invoking the elaborate apparatus of a trial, despite the most formidable justification proffered by an employer.

This case is an example. Not only is it apparent that two presidents, a vice president, a dean, and the personnel committee of the Board of Trustees, as to none of whom is there an allegation of a controversy with plaintiff, consistently adhered to the decision not to extend to plaintiff post-65 employment, but there is the conceded policy of the University, set forth in the Handbook, that only in "rare and unusual circumstances" and at the discretion of the University, would employment be continued for a faculty member who had reached 65.

Perhaps it is not plaintiff's burden to allege facts that indicate that he would be a likely object for the exercise of such rarefied discretion. In *Perry* v. *Sindermann*, 408 U.S. 593 (1972), the school authorities had full discretion to renew each year's contract or not. Plaintiff's claim was not barred by the fact that he had no "right" to continued employment. Similarly, plaintiff here does not have the burden of alleging that he had a right to continued employment or even facts showing a high probability that he would have been found clearly to have met the "rare and unusual circumstances" standard. *See Mt. Healthy City Board of Education* v. *Doyle*, 429 U.S. 274, 287 (1976) (burden on the employer to demonstrate that it would have reached the same decision even in the absence of the protected conduct).

Nevertheless, the Handbook policy is not entirely without significance on the issue of the propriety of the dismissal of Count I. If plaintiff's complaint were that he had held a position for a period of years and that, following some expressed disagreement on an issue of public concern with his employer, he had been discharged, a court might, in the absence of other background, deem the complaint sufficient. *But see Leonardo* v. *Moran*, *supra* 611 F.2d at 397. This complaint, however, does not present an adverse action coming out of the blue, explained only by the prior disagreement on a matter of public concern. It presents an action in line with a clearly articulated standard, by its explicit terms difficult to meet. In such a case we are not disposed to retreat from the criterion of minimal factual allegations that we have consistently required. This case, while posing a close issue on a motion to dismiss, falls just outside our holding in *McDonald* v. *Hall*, 610 F.2d 16 (1st Cir. 1979), where, in a split opinion, we held that a complaint alleging a retaliatory prisoner transfer stated a claim — where the nature of plaintiff's conduct (giving legal assistance to other prisoners) was clear and the "chronology of events

. . . [provided] some support for an inference of retaliation." *Id.* at 18.

We therefore hold that the district court did not err in dismissing Count I for failure to state a claim.

Counts II, III, V and VI

The trial court dismissed Counts II, III, V and VI of plaintiff's claim as time barred. In adherence to the "well established practice of looking to the state statute 'most analogous' to the particular civil rights cause of action alleged in the complaint", *see Burns* v. *Sullivan*, 619 F.2d 99, 105 (1st Cir. 1980), the court determined that the most analogous state statute was the New Hampshire "Law Against Discrimination", N.H. RSA 354-A, which included a provision against age discrimination and which provided 90 days for aggrieved persons to file complaints of unlawful discriminatory practices and six months for the attorney general to file such a complaint. Under either the 90 day or the 6 month time limit, the court decided, plaintiff's claims in Counts II, III, V and VI were too late. Plaintiff filed his complaint on July 29, 1981, three years after he was retired from the University and more than three and a half years after he received notice that he would be forced to retire.

On appeal, plaintiff urges several grounds for reversal of that decision. First, plaintiff argues that Counts III, V and VI did not raise age discrimination claims and therefore that the statute of limitations under the New Hampshire "Law Against Discrimination" should not have been applied. Instead, the appropriate statute of limitations should have been the 6 year statute applicable to claims sounding in tort. Next, plaintiff argues that the 90 day or 6 month limit was improperly applied to Count II, because, unlike the plaintiff in *Burns*, he had no available administrative remedy. Plaintiff's third

ground for reversal is that, even assuming the applicability of N.H. RSA 354-A to Counts II, III, V and VI, the defendants should be estopped from asserting the time bar by their tactics of evasion, which prevented the plaintiff from filing his claim. Finally, plaintiff argues that Count V should not be dismissed as time barred because it alleged a continuing violation.

It is unnecessary for us to address all of plaintiff's arguments to determine that Counts II, III, V and VI were properly dismissed. As plaintiff admits in his brief, "the equal protection claim set forth in Count III is dependent as to its viability upon Count I", since it requires the court to find that age was irrelevant to the University's decision and therefore that plaintiff was similarly situated to a dismissed tenured faculty member under the age of 65. Having determined that the facts alleged in Count I are insufficient to state a claim for relief, we are forced to the same conclusion regarding Count III.

Count V fails for the same reason that we affirmed the dismissal of Count I. The allegation that others on the faculty who have reached the age of 65 within the last few years have been treated more favorably with respect to opportunities for extended employment and employment after retirement is simply too conclusory to state a claim that plaintiff was denied the equal protection of the laws. Plaintiff failed to mention who the similarly situated individuals were, what their qualifications were, what opportunities they were given, what opportunities he was denied or how he was qualified to take advantage of those opportunities.

Count II attacked the University's retirement policy as unconstitutional. On that Count, there is little dispute that the New Hampshire "Law Against Discrimination" is the most analogous state statute and that under either that statute's 90 day or its 6 month limit the complaint was filed too late. The fact that plaintiff had no available administrative remedy does not render the state statute inapplicable. *See Holden* v. *Com-*

mission Against Discrimination, 671 F.2d 30, 33 (1st Cir. 1982). Nor are defendants estopped from asserting the time bar. There is no evidence that plaintiff was induced not to file his suit and the fact that the University entertained his grievance does not toll the running of the limitations period. *Delaware State College* v. *Ricks*, 449 U.S. 250, 261 (1980).

Finally, Count VI was too late under even the New Hampshire general six year statute of limitations. The allegations are based on events in 1967-68 and 1971-72. The assertion that the effect of those events continued[3] through 1977-78 cannot remedy the fact that the complaint was fileld too late.[4] *See Goldman* v. *Sears, Roebuck & Co.*, 607 F.2d 1014, 1018 (1st Cir. 1979).

The judgment of the district court is affirmed.

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[3] Plaintiff does not urge that Count VI alleges a continuing violation. His complaint recites individual yearly deprivations of his fair salary. He further alleges, however, that each of those yearly deprivations was the direct result of the biased recommendations of Professors Palmer and Straus for the years 1967-68 and 1971-72.

[4] The only allegation in Count VI that could survive a dismissal for untimeliness under any statute of limitations is that in paragraph 62, which alleges that as a result of defendant Spitz's prejudices against him, during his last academic year his salary was lowered even further than what it would otherwise have been. Plaintiff's claim that this treatment denied him equal protection is, for the reasons noted regarding Count V, too conclusory to state a claim for relief. His due process claim fails because he can point to no property interest in a specific level of salary increase.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 82-1486

RICHARD DEWEY,
Plaintiff, Appellant,

v.

THE UNIVERSITY OF NEW HAMPSHIRE, ET AL.,
Defendants, Appellees.

ERRATA SHEET

Please make the following correction in the opinion in the above case released on November 26, 1982:

Page 2, line 9 from bottom — "*18* U.S.C." should read "*42* U.S.C."

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 82-1486.

RICHARD DEWEY,
Plaintiff, Appellant,
v.
THE UNIVERSITY OF NEW HAMPSHIRE, ET AL.,
Defendants, Appellees.

Coffin, Chief Judge,
Timbers, Senior Circuit Judge,
and Breyer, Circuit Judge.

ORDER OF COURT

Entered December 28, 1982

It is ordered that the petition for rehearing filed on December 10, 1982 be, and the same hereby is, denied.

By the Court:

DANA H. GALLUP, Clerk.

By /s/_____
Chief Deputy Clerk.

[cc: Messrs. Gearreald and Millimet.]

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

RICHARD DEWEY,
Plaintiff

vs. CIVIL ACTION No. 81-372-L

THE UNIVERSITY OF NEW HAMPSHIRE;
ALLAN SPITZ;
EUGENE S. MILLS;
MURRAY STRAUS;
STUART H. PALMER;
EVELYN E. HANDLER;
GORDON A. HAALAND; and
ROLAND KIMBALL,
Defendants

AMENDED COMPLAINT

1. Plaintiff Richard Dewey brings this action under 42 U.S.C. § 1983 seeking declaratory and injunctive relief and damages to redress deprivations by the defendants of his First Amendment rights to Due Process and Equal Protection of the Laws under the Fourteenth Amendment of the Constitution of the United States.

2. Jurisdiction is founded upon 28 U.S.C. § 1331(a) as the matter in controversy exceeds the sum or value of $10,000.00 exclusive of interest and costs, and arises under the Constitution of the United States.

3. Jurisdiction is also founded upon 28 U.S.C. § 1343(3) as plaintiff seeks to redress deprivation by the defendants, under color of State law, statute, ordinance, regulation, custom or usage, of rights secured by the Constitution of the United States and Acts of Congress providing for equal rights of citizens of the United States.

4. Jurisdiction is also founded upon 28 U.S.C. § 1343(4) as plaintiff seeks to recover damages and to secure equitable relief under an Act of Congress providing for the protection of civil rights.

5. The Court's authority to issue a declaratory judgment and to grant injunctive relief based thereon is founded upon 28 U.S.C. §§ 2201, 2202 and its powers as a Court of equity jurisdiction.

6. Plaintiff Richard Dewey is a citizen of the State of New Hampshire residing on Packers Falls Road in the Town of Durham.

7. Defendants are:

a. The University of New Hampshire (hereinafter "the University");

b. Allan Spitz, former dean of the College of Liberal Arts at the University, who is sued in his individual capacity only and who is a citizen of Wyoming residing at East of Laramie, Laramie, Wyoming 82070;

c. Eugene S. Mills, former President of the University, who is sued in his individual capacity only and who is a citizen of California residing at 13952 East Summit Street, Whittier, California 90605;

d. Murray Straus, presently a Professor of Sociology at the University and at one time co-Chairman of its Department of Sociology and Anthropology, who is sued in his individual capacity only and who is a citizen of New Hampshire residing at 33½ Mill Pond Road, Durham, New Hampshire 03824;

e. Stuart H. Palmer, who is sued in both his individual capacity and his present official capacity as Chairman of the Department of Sociology and Anthropology at the University, and who is a citizen of New Hampshire residing at Riverview Road, Durham, New Hampshire 03824;

f. Evelyn E. Handler, who is sued in both her individual capacity and her present official capacity as President of the University, and who is a citizen of New Hampshire residing at The President's House, Main Street, Durham, New Hampshire 03824.

g. Gordon A. Haaland, who is sued in both his individual capacity and his present official capacity as Vice President for Academic Affairs at the University, and who is a citizen of New Hampshire residing at Wednesday Hill Road in Lee, New Hamphsire 03824; and

h. Roland Kimball, who is sued in both his individual capacity and his present official capacity as Acting Dean of the College of Liberal Arts at the University, and who is a citizen of New Hampshire residing at Riverview Road in Durham, New Hampshire 03824.

COUNT I

8. Plaintiff, Richard Dewey, was born on November 1, 1912.

9. Plaintiff commenced his teaching career in 1941 at Butler University in Indianapolis, Indiana and subsequently taught at several other institutions of higher learning prior to coming to the University of New Hampshire.

10. Plaintiff joined the faculty of the University of New Hampshire in 1958, having been vigorously sought after to become its Chairman of the Department of Sociology.

11. Plaintiff served as the Chairman of said Department from 1958 to 1964 and was accorded full tenure status in the academic year 1959-60.

12. During the first semester of each academic year since 1958 up to and including the academic year 1977-78, plaintiff received a letter informing him of his appointment for that year and his salary therefor.

13. During the fall semester of the academic year 1977-78, aware that he would turn sixty-five years of age on November 1st of 1977 and that the University had a provision in its Faculty Handbook regarding retirement at that age, plaintiff began informal discussion with colleagues as to their views on ageism.

14. In keeping with the country-wide momentum to abolish age as a job criterion, plaintiff found widespread support for his retention among the University community, with the exception of Allan Spitz, then Dean of the College of Liberal Arts, who was the University official responsible for making the decision in the first instance with regard to plaintiff's retention.

15. Defendant Allan Spitz served as Dean of the College of Liberal Arts at the University from July of 1971 to June of 1980.

16. During those years, both publicly and to defendant Spitz in person, Professor Dewey voiced views on University matters that were contrary to those of defendant Spitz.

17. These expressions of views by plaintiff constituted conduct that is constitutionally protected by the First Amendment of the Constitution of the United States.

18. In the fall of 1977, defendant Spitz, acting under color of state law, issued a tersely worded decision that plaintiff would have to retire at the end of the 1977-1978 academic year because of University policy regarding retirement at the age of 65.

19. No offer was made to plaintiff in that decision either for extended employment or employment after retirement.

20. The reason cited by defendant Spitz for his decision was a mere pretext: A substantial factor in his decision was plaintiff's past exercise of his right of freedom of speech guaranteed by the First Amendment and incorporated by the Fourteenth Amendment to the Constitution of the United States.

21. In so deciding, defendant Spitz acted knowingly, maliciously, and out of retaliation against the aforementioned exercise by plaintiff of his First Amendment rights.

22. No letter of reappointment for the academic year 1978-79 was ever sent to plaintiff.

23. Throughout the three and one-half years since the issuance of the Spitz decision, plaintiff has sought, at the suggestion and behest of various University officials, to appeal the aforesaid knowing, malicious, and impermissibly motivated action by defendant Spitz through the following University administrative channels: Vice President for Academic Affairs Gordon A. Haaland, former President Eugene S. Mills, present President Evelyn E. Handler, Acting Dean of the College of Liberal Arts Roland Kimball, and the Personnel Committee of the Board of Trustees of the University.

24. Despite expressions of support for plaintiff's retention from all sectors of the University community, the aforementioned defendants Haaland, Mills, Handler, and Kimball, acting under color of state law, rejected plaintiff's appeals, basing their decisions on the aforesaid action of defendant Spitz.

25. Had defendant Spitz not taken the knowing, malicious, and impermissibly motivated action that he did in deciding to retire plaintiff, the University policy regarding retirement at the age of 65 would not have been applied in plaintiff's case by the administration at the University.

26. Plaintiff was the only tenured professor to have been mandatorily retired between the time of passage by the Congress of the United States of the Age Discrimination in Em-

ployment Acts of 1978, and 1979, when the University formally abolished mandatory retirement.

27. Plaintiff's last avenue of administrative resolution of his appeal was foreclosed in March of 1981 when the Personnel Committee of the Board of Trustees of the University refused to meet with him, thereby rendering final the Spitz-Haaland-Mills-Handler-Kimball decision.

28. As a direct result of said decision, which violated plaintiff's Fourteenth Amendment right to be free of retaliatory state action for exercise of his First Amendment rights, plaintiff has suffered loss of wages, loss of retirement benefits, and loss of insurance benefits.

COUNT II

29. The allegations set forth in the above paragraphs 8 through 28 are hereby adopted and incorporated by reference as part of this Count II.

30. If the aforementioned decision to terminate plaintiff as an active member of the University faculty at the end of the 1977-1978 academic year was in fact based upon the University's then existing policy on retirement, said decision was violation of plaintiff's Fourteenth Amendment right to Equal Protection of the Laws, for the policy itself contains an age classification that is not rationally related to any legitimate state interest.

31. As a direct result of the above violation of plaintiff's said right to Equal Protection of the Laws, plaintiff has suffered loss of wages, loss of retirement benefits, and loss of insurance benefits.

COUNT III

32. The allegations set forth in the above paragraphs 8 through 31 are hereby adopted and incorporated by reference as part of this Count III.

33. Under the University personnel policies that existed for the academic year 1977-1978, a tenured faculty member under age 65 who was denied reappointment would have been afforded a host of procedural safeguards prior to any such dismissal.

34. Plaintiff was similarly situated to a dismissed tenured faculty member under the age of 65 but was denied the aforementioned procedural safeguards by administrators Haaland, Mills, Handler, and Kimball who were acting under color of state law.

35. Because the aforementioned University personnel policies as applied to plaintiff's case contain a classification of faculty members — between those who are afforded and those who are not afforded procedural safeguards before their dismissal — that discriminates against persons who are similarly situated, without being rationally related to any legitimate state interest, plaintiff was thereby denied his Fourteenth Amendment right to Equal Protection of the Laws.

36. As a direct result of the above denial of plaintiff's said right to Equal Protection of the Laws, plaintiff has suffered loss of wages, loss of retirement benefits, and loss of insurance benefits.

COUNT IV

37. The allegations in the above paragraphs 8 through 36 are hereby adopted and incorporated by reference as part of this Count IV.

38. At some point in the early part of the academic year 1978-1979, during which time plaintiff was appealing his termination to then President Eugene S. Mills, the University administration headed up by said Mills and acting under color of state law directed that plaintiff's name be stricken from all University publications including phone books, directories, graduate and under-graduate catalogs, and mailing lists.

39. Neither said Mills nor any other member of the University administration has ever afforded plaintiff any process (such as a statement of reasons, notice or hearing) in connection with said total deletion of plaintiff's name from University publications.

40. As a direct result of said total deletion without any process whatsoever of the record of plaintiff's twenty year association with the University, plaintiff's good name, reputation, honor and integrity among the academic community have been impaired and thus his interest in liberty under the Fourteenth Amendment has been deprived without Due Process of Law.

COUNT V

41. The allegations in the above paragraphs 8 through 40 are hereby adopted and incorporated by reference as part of this Count V.

42. Since his forced departure as an active member of the faculty at the end of the 1977-1978 academic year, the only opportunities held out by the University to plaintiff for further employment have been the chance to teach one course in the 1980 Summer Session and a last-minute offer of two "not guaranteed" courses for the Spring of 1981, the first of which was cancelled for lack of enrollment and the second of which was scheduled during summer months during which plaintiff had already made other commitments.

43. There have been other instances since that time where the University has had need of services that could have been provided by plaintiff (and would have been provided by him without remuneration if that were not available), about which plaintiff was not contacted, and that went to others instead.

44. The University officials acting under color of state law who have been responsible for deciding whether opportunities for further employment should be afforded plaintiff, have in-

cluded Vice President for Academic Affairs Gordon A. Haaland, former Dean of the College of Liberal Arts Allan Spitz, acting Dean of the College of Liberal Arts Roland Kimball, and Chairman of the Department of Sociology and Anthropology Stuart H. Palmer (the last of whom has for a number of years harbored extreme personal animosity towards plaintiff).

45. There are other individuals on the faculty of the University who are similarly situated to plaintiff in that they have reached the age of sixty-five within the last few years but who, unlike plaintiff, have received much more favorable treatment by the University and its officials with respect to opportunities for extended employment and employment after retirement.

46. Said disparate treatment of plaintiff by the University and the officials mentioned above in paragraph 44 has been and continues to be arbitrary and not grounded in any rational reason, therefore denying plaintiff his Fourteenth Amendment right to Equal Protection of the Laws.

47. As a direct result of said denial of plaintiff's right to Equal Protection of the Laws, plaintiff has suffered loss of wages, loss of retirement benefits, and loss of insurance benefits.

COUNT VI

48. The allegations in the above paragraphs 8 through 47 are hereby adopted and incorporated by reference as part of this Count VI.

49. Professor Dewey was sought after by the University in 1958 to become its Chairman of the Department of Sociology on account of his publication of several books and articles during his prior association with the University of Illinois.

50. Besides having served as Chairman of the Department of Sociology at the University from 1958-1964, Professor

Dewey has on an annual basis since 1964 published articles and book reviews in sociological journals, presented papers at meetings of professional associations, chaired meetings of national and regional planning societies, and published and revised a text on Introductory Social Psychology.

51. While at the University, Professor Dewey has conducted and published the results of research on Social and Political Attitudes, has designed new courses, and for a number of years taught more students than any other member of his department.

52. Professor Dewey has throughout his teaching career at the University received high ratings in students reviews of his courses.

53. At the time Professor Dewey came to the University in 1958, he was the highest paid professor in the College of Liberal Arts.

54. Beginning the academic year 1967-68 and continuing through the academic year 1974-75, Professor Dewey's annual salary was set at less than the average salary for full professors at the University, whereas in academic years prior to 1967 his salary had exceeded the average salary for full professors at the University.

55. In terms of his years of experience, dedication to teaching as well as commitment to research and publication, and popularity with students, Professor Dewey was similarly situated to full professors of above average salary, but was compensated on a less than average salary basis.

56. In the academic years subsequent to 1975 and up until his untimely dismissal after the 1977-1978 academic year, Professor Dewey's salary continued not to approach that of professors with whom he was similarly situated in experience and ability, but rather corresponded to that of the average salary of a full professor at the University.

57. The University was acting under color of state law in setting the salary levels for its professors for each of the academic years from the academic year 1967-68 to the academic year 1977-78.

58. For the academic year 1967-68 the University, pursuant to its custom, determined Professor Dewey's salary in accordance with the recommendation of then Chairman of the Department of Sociology Stuart Palmer, who was acting under color of state law in so recommending.

59. For the academic year 1971-1972, the University, pursuant to its custom, determined Professor Dewey's salary in accordance with the recommendation rendered at the end of the previous academic year by then co-Chairman Murray Straus, who was acting under color of state law in that year.

60. Professors Palmer and Straus harboured extreme personal animosity towards Professor Dewey, and their recommendations as to Professor Dewey's salary, upon which the University based the salary it paid to him during the academic years for which Palmer and Straus recommendations were submitted, were arrived at knowingly, maliciously, and in accordance with these animosities rather than being grounded in any rational basis or based on any reasonable criteria.

61. The University's payments of less than the average salary for a full professor to Professor Dewey during the academic years 1967-68 to 1974-75, and mere matching of his salary with that of the average salary in the academic years 1975-76 to 1977-78 were the direct result of the University's earlier following of the knowing, malicious, irrational, and biased recommendations of Professors Palmer and Straus for the academic years 1967-68 and 1971-1972.

62. Plaintiff's salary for his last academic year as a member of the University faculty was lowered even further than what it otherwise would have been as a direct result of the University's determining of same in accordance with the

instructions of then Dean of the College of Liberal Arts Allan Spitz who, acting under color of state law, knowingly and maliciously based his recommendation upon his personal prejudices against plaintiff rather than upon any rational basis or reasonable criteria.

63. On account of the above actions of the University, Stuart Palmer, Murray Straus, and Allan Spitz under color of state law in depriving plaintiff of a salary comparable to that of similarly situated full professors at the University, plaintiff has been subjected to a continuing course of discrimination and therefore denied his Fourteenth Amendment right to Equal Protection of the Laws.

64. Plaintiff was a tenured faculty member during the academic years 1967-68 through 1977-78 and by virtue of the common practice of the University with respect to salaries for tenured professors of similar years of experience and accomplishment, had a legitimate claim of entitlement during those years to a salary exceeding that of the average salary of a full professor.

65. Therefore, by their arbitrary and irrational actions with respect to plaintiff's salary during those years, the aforementioned defendants acting under color of state law deprived plaintiff of property in violation of his right to substantive Due Process of Law under the Fourteenth Amendment.

66. As a consequence of aforesaid denials of his Fourteenth Amendment rights, plaintiff has suffered loss of salary, loss of retirement benefits, and loss of insurance benefits.

RELIEF

WHEREFORE, plaintiff respectfully requests that this Honorable Court:

A. Declare that the above actions under color of state law by the University of New Hampshire and the named individual defendants have violated plaintiff's First Amendment rights, his Fourteenth Amendment right to Due Process of the Law, and his Fourteenth Amendment right to Equal Protection of the Laws.

B. Order that plaintiff be reinstated as a full teaching member of the faculty of the University of New Hampshire with full restoration of his name in that capacity to all University publications.

C. Award plaintiff $150,000.00 representing his loss of wages, loss of retirement benefits, and loss of insurance benefits for the academic years 1978-79, 1979-80, and 1980-81.

D. Award plaintiff $50,000.00 for his loss of salary for the academic years 1967-68 through 1977-78 inclusive.

E. Award plaintiff punitive damages against the defendants named in their individual capacities in the sum of $200,000.00

F. Award plaintiff interest and costs, and attorney's fees in accordance with 42 U.S.C. § 1988.

G. Plaintiff demands trial by jury.

Respectfully submitted,

RICHARD DEWEY

By His Attorneys

SHUTE, ENGEL & MORSE, P.A.

By: _____

Mark S. Gearreald

Dated: February 26, 1982

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

RICHARD DEWEY,
Plaintiff

vs. CIVIL ACTION No. 81-372-L

THE UNIVERSITY OF NEW HAMPSHIRE;
ALLAN SPITZ;
EUGENE S. MILLS;
MURRAY STRAUS;
STUART H. PALMER;
EVELYN E. HANDLER;
GORDON A. HAALAND; and
ROLAND KIMBALL,
Defendants

MOTION FOR LEAVE TO FURTHER AMEND COMPLAINT

NOW COMES the Plaintiff in the above-entitled matter, by his attorneys Shute, Engel & Morse, P.A., and says:

1. That in light of matters raised by the Court and counsel at the hearing on Defendants' Motion to Dismiss held on March 2, 1982, Plaintiff seeks leave to further amend his complaint by substituting the following paragraphs 16 and 26 for those paragraphs as they appear respectively in the Amended Complaint that has already been filed by Plaintiff:

16. During those years, both publicly and to defendant Spitz in person, Professor Dewey voiced views on University matters of public concern that were contrary to those of defendant Spitz.

26. There were at least three tenured professors who reached the age of 65 during the academic years 1977-78 and 1978-79, but only the plaintiff was forced to retire by the University. Consequently, plaintiff was the only tenured professor to have been mandatorily retired between the time of passage by the Congress of the United States of the Age Discrimination Act Amendments of 1978 and when the University formally abolished mandatory retirement in 1979.

2. That allowing Plaintiff to further amend his Complaint at this time will assist the Court in resolving the issues raised by Defendants' currently pending Motion to Dismiss, without significant prejudice to Defendants.

WHEREFORE, Plaintiff respectfully requests that this Honorable Court:

A. Grant him leave to substitute for paragraphs 16 and 26 of his Amended Complaint the following paragraphs 16 and 26:

16. During those years, both publicly and to defendant Spitz in person, Professor Dewey voiced views on University matters of public concern that were contrary to those of defendant Spitz.

26. There were at least three tenured professors who reached the age of 65 during the academic years 1977-78 and 1979-79, but only the plaintiff was forced to retire by the University. Consequently, plaintiff was the only tenured professor to have been mandatorily retired be-

tween the time of passage by the Congress of the United States of the Age Discrimination Act Amendments of 1978 and when the University formally abolished mandatory retirement in 1979.

B. Grant such other and further relief as may be just.

Respectfully submitted,
RICHARD DEWEY

By: SHUTE, ENGEL & MORSE, P.A.
His Attorneys

By: _____
MARK S. GEARREALD

DATE: MARCH 10, 1982

CERTIFICATE OF SERVICE

I hereby certify that a copy of the within Motion has been mailed this 10th day of March, 1982, postage prepaid, to Joseph A. Millimet, Esq., opposing counsel.

/s/_____
MARK S. GEARREALD

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

RICHARD DEWEY,
Plaintiff,

v. CIVIL ACTION
NO. 81-372-C

THE UNIVERSITY OF NEW HAMPSHIRE, ET AL,
Defendants.

MEMORANDUM

May 19, 1982

CAFFREY, J.*

Plaintiff Richard Dewey, retired from the faculty of the University of New Hampshire at the close of the academic year following his 65th birthday, brought this action under 42 U.S.C. § 1983 against the University and various of its officials and faculty, who are sued either as individuals or in both their individual and official capacities. Plaintiff seeks declaratory and injunctive relief and damages to redress alleged deprivations of his First Amendment rights and his rights to due process and equal protection of the laws under the Fourteenth Amendment allegedly committed by the defendants under color of state law.

The matter is now before the Court on defendants' motion to dismiss the complaint and/or for summary judgment. Defendants' motion challenges the sufficiency of the entire com-

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* District of Massachusetts, sitting by designation.

plaint to state any claim for relief, and further challenge counts II, III, V, and VI as time-barred under the applicable statute of limitations.

I. *The Complaint*

The gist of plaintiff's rather prolix sixty paragraph complaint is as follows: plaintiff joined the faculty of the University of New Hampshire in 1958 as the chairman of the Department of Sociology, in which capacity he served from 1958 to 1964. The University accorded him full tenure status in the academic year 1959-1960. In the fall of 1977 the University notified plaintiff that he would be retired at the close of the academic year, plaintiff having reached the mandatory retirement age of 65 under the University's then-existing policy.[1]

Defendant Allan Spitz was dean of the College of Liberal Arts at the University from July 1971 to June 1980. Plaintiff alleges that Spitz made the "decision" that plaintiff would have to retire at the end of the 1977-78 academic year for the stated reason of University retirement policy, but that a sub-

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[1] The University's retirement policy in effect during plaintiff's tenure, set forth under the heading "Retirement" in the September 1976 edition of the Faculty Handbook reads as follows:

> The tenure of each member of the faculty terminates on June 30 following his/her 65th birthday, except for members of the faculty in service on July 1, 1938, who will reach compulsory retirement on June 30 following the 69th birthday . . .
>
> *Under rare and unusual circumstances* and at the discretion and on the initiative of the University, employment of a member of the faculty may be extended beyond the normal retirement age, with retirement being postponed . . . ." (emphasis added)

I rule as a matter of law that the policy is an element of plaintiff's contractual relationship with the University. *See Greene* v. *Harvard University*, 412 F.2d 1128, 1135 (D.C. Cir. 1969).

stantial factor in his decision was plaintiff's past exercise of his right of freedom of speech. Plaintiff does not outline the nature of the protected activity, except to allege that he and defendant Spitz disagreed on "University matters" of "public concern."

Defendants Mills, Haaland, Handler and Kimball, are now or were members of the University administration, through whom plaintiff alleges he sought, without success, to appeal the so-called "Spitz decision." Plaintiff further alleges that he sought relief from the so-called "Spitz-Haaland-Mills-Handler-Kimball" decision through the Personnel Committee of the Board of Trustees, but that in March 1981 that committee refused to meet with him.

Following plaintiff's retirement, and while he was disputing his retired status, plaintiff's name was not included in University publications as a member of the faculty. Plaintiff did not elect emeritus status. Plaintiff alleges that defendant Mills as head of the University administration was responsible for his name being omitted from such listings, and that the omission harmed his reputation.

Since 1978, the University has offered plaintiff some opportunities for further employment, including the opportunity to teach one course during the 1980 summer session, and an offer to teach two "not-guaranteed" courses during the Spring of 1981. The first of these "not-guaranteed" courses was cancelled for lack of enrollment, and plaintiff declined to teach the other one because of previous commitments. Plaintiff alleges that defendants Haaland, Spitz, Kimball, and Chairman of the Department of Sociology and Anthropology, Stuart Palmer, were responsible for deciding whether to offer opportunities for further employment to plaintiff, and that they arbitrarily denied him such opportunities because of personal animosity towards him.

As customary at the University, during the first semester of each academic year since 1958 up to and including the academic year 1977-78, plaintiff received a letter informing him of his appointment for that year and his salary therefor, determined in accordance with recommendations rendered at the end of the previous academic year. Plaintiff states that beginning in 1967-68 through 1974-75 his salary was set at less than the average salary for full professors at the University, although prior to 1967 his salary had exceeded the same average. From 1975 until his retirement, plaintiff states that he was compensated on a basis comparable to the average salary of a full professor, but claims that he was undercompensated relative to professors of like experience and ability. Plaintiff alleges that his salary during these years was based on biased recommendations by defendants Spitz, Palmer, and Straus former co-chairman of the department of sociology, who acted out of personal animosity towards plaintiff.

Plaintiff claims in six counts that (1) his retirement in 1978 was forced under the pretext of the University's mandatory retirement policy in retaliation for his exercise of First Amendment rights; (2) the University's mandatory retirement policy is itself unconstitutional because it contains an age classification not rationally related to any legitimate state interest; (3) in being retired from the University, the University administration denied plaintiff constitutionally required procedural safeguards; (4) plaintiff's liberty interest in reputation has been impaired as a result of the University's omission of his name from University directories following his retirement; (5) plaintiff was denied equal protection as a result of deprivation of opportunities for extended employment and employment after retirement on arbitrary grounds; and (6) plaintiff was deprived of property in violation of his rights to substantive due process as a result of alleged prejudice in salary recommendations during the years 1967-1978.

I rule that Count I of the complaint, alleging retaliatory state action in connection with the exercise of First Amendment rights, fails to allege facts or circumstances from which an inference of abridgement of First Amendment rights reasonably follows, and therefore, should be dismissed for failure to state a claim. Applying the "most analogous" state statute of limitations, Counts II, III, V, and VI clearly should be dismissed as time-barred, therefore it is unnecessary to decide whether the allegations in those counts are sufficient to state claims for relief. I further rule that Count IV of the complaint fails to state a claim for relief, under any set of facts the plaintiff might prove, and therefore also should be dismissed.

II. *Sufficiency of the Complaint*

A. Count I

In Count I plaintiff seeks to characterize the notice that he would have to retire at the end of the 1977-78 academic year because of the University's then existing policy regarding retirement at age 65 as the "Spitz-decision." Plaintiff's personal characterization of his retirement cannot change the plain terms of his contractual relationship with the University, as defined by the Faculty Handbook.[2] *See Fisher* v. *Flynn*, 598 F.2d 663, 665 (1st Cir. 1979); *Greene* v. *Howard University*, 412 F.2d 1128, 1135 (D.C. Cir. 1979).

By the plain language of the Faculty Handbook, the University's retirement policy is mandatory in its operation except

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[2] In Count III, plaintiff again distorts the plain meaning of the language of the Faculty Handbook to characterize his retirement as a "dismissal". He then speciously claims that he was unequally treated in being denied the procedural safeguards ordinarily afforded dismissed members of the faculty. Although Count III is dismissed on other grounds, it is flawed in the same manner as Count I, since plaintiff seeks to rely on his subjective and erroneous legal conclusions to state a claim for relief.

under "rare and unusual circumstances." In plaintiff's case, it appears that the policy articulated in the Handbook was followed, and plaintiff was routinely retired at 65. At that point, under the terms of plaintiff's contractual relationship with the University, discretion to exercise an option to retain plaintiff was vested in the University, which, "under rare and unusual circumstances" and on its initiative could have postponed plaintiff's retirement. *See* note 1, *infra*. Plaintiff cannot transform the University's non-exercise of its option into an affirmative denial of his "rights" by mere characterization. Even if the University's policy were to uniformly retain those over 65 who presented "rare and unusual circumstances," plaintiff has not alleged "rare and unusual circumstances" in this case. Rather, plaintiff has alleged that he found widespread support for his retention among the University community, and that at least two other faculty members reached 65 during the time before the provision was repealed and were not retired. Plaintiff has not alleged that there were no special circumstances involved in the University's alleged retention beyond the usual retirement age of these two unnamed individuals or that the University's decisions in those cases demonstrate an abuse of its discretion in these matters.

Plaintiff's allegations do not raise the inference that defendant Spitz should have supported the plaintiff's retention beyond the mandatory retirement age under the University's existing policy, and without more, do not raise the inference that the mandatory policy was discriminatorily applied. As plaintiff himself alleges, the "decision" to apply the policy was supported and upheld by higher levels of administration. The usual presumption is that the retirement policy in effect at the time was a rightful exercise of the University's Board of Trustees' discretion in faculty employment matters. *Lyons* v. *Sullivan*, 602 F.2d 7 (1st Cir. 1979); *Kadar Corporation* v. *Milbury*, 549 F.2d 230 (1st Cir. 1977).

Nor do plaintiff's allegations, even as twice-amended,[3] raise the inference that he was retaliated against for exercising his First Amendment rights. To state a claim for relief plaintiff must allege facts or circumstances which give at least some rudimentary shape to his claim that defendant Spitz "acted knowingly, maliciously, and out of retaliation against the aforementioned exercise by plaintiff of his First Amendment rights." *See, e.g., Glaros* v. *Pearse*, 628 F.2d 679, 684 (1st Cir. 1980); *Fisher* v. *Flynn*, 598 F.2d 663, 665 (1st Cir. 1979).

The plaintiff expressed views on "University matters" of "public concern" that were contrary to those of defendant Spitz is merely plaintiff's subjective and conclusory assessment of the nature and legal effect of his alleged disagreement with defendant Spitz; even after an opportunity to amend his complaint to meet defendant's specific arguments on the motion to dismiss, plaintiff has still failed to mention the subject matter of his views or outline any events or circumstances from which his legal conclusions reasonably follow. Plaintiff's reliance on *Gomez* v. *Toledo*, 446 U.S. 635 (1980), in support of the sufficiency of his claim is misplaced. In that case, the court held that in order to state a cause of action under § 1983, a plaintiff need allege only that some person has deprived him of a federal right, and that that person acted under color of state law. *Id.* at 640. The Court's holding in *Gomez* does not, however, relieve a plaintiff of the obligation to plead something more than simple conclusions; rather, the import of the holding in *Gomez* is that a plaintiff in a § 1983 action need not plead "bad faith" on the part of the public official. *Id.* at 638, 640.

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[3] Over defendants' objection, and after argument on defendants' motion to dismiss, heard March 2, 1982, this Court allowed plaintiff to amend his February 16, 1982 amended complaint to allege that the "University matters" over which he and defendant Spitz disagreed were of "public concern." Even as most recently amended these allegations remain conclusory and nonfactual.

Plaintiff in this case has failed to fulfill even the first requirement of *Gomez*, that there be an allegation of a deprivation of a federal right, by failing to allege any circumstances from which follow his subjective legal conclusion that his First Amendment rights were abridged. The court will not accept such bare conclusions as sufficient to state a claim of deprivation of federal right under color of state law, especially where, as in this case, the inference to be drawn from the facts alleged in the pleadings is that the University acted properly within its discretion. *See* Wright & Miller, Federal Practice and Procedure: Civil § 1357, p. 597. Accordingly, Count I of the complaint, in its final amended form, is insufficient to state a claim for relief and should be dismissed.

B. Count IV

Plaintiff's claim that the omission of a retired faculty member's name from current university faculty listings somehow impairs "good name, reputation, honor and integrity among the academic community" strains credulity. Plaintiff was not listed "emeritus", unquestionably a designation of honor, in deference to the position he had taken regarding his retirement. The omission of his name from faculty listings could indicate only that he was no longer a full member of the faculty, which in itself could not seriously damage his standing and associations in the community. There is no claim that the University made charges, for example, of dishonesty or immorality, which might have implicated a liberty interest. *See Board of Regents* v. *Roth*, 408 U.S. 564 (1972). Plaintiff does not allege that *any* charges, express or implied, were leveled against him upon retirement. Even if the University had somehow implied that plaintiff was retired for incompetence, no liberty interest would have been implicated. *See Ventetuolo* v. *Burke*, 596 F.2d 476 (4th Cir. 1979), and cases cited

therein at 483-84. Nor is there any suggestion that the University, by omitting plaintiff's name from faculty listings, foreclosed plaintiff's freedom to take advantage of other employment opportunities. *See Board of Regents* v. *Roth*, *supra*, 408 U.S. at 573-74. Viewing the allegations in the light most favorable to plaintiff, plaintiff's claim simply does not implicate any "liberty interest." Therefore, because plaintiff can prove no set of facts to support the claim which would entitle him to relief, Count IV should be dismissed. *Kadar Corporation* v. *Millbury*, 549 F.2d 230, 233 (1st Cir. 1977).

III. *Timeliness of the Complaint*

Plaintiff filed this suit on July 29, 1981, three years after he was actually retired from the University at the end of the 1977-78 academic year, and more than three and one-half years after he was notified in the fall of 1977 of the University's intention to apply its mandatory retirement policy. With regard to the claim in Count II that the University's retirement policy itself was unconstitutional,[4] whatever limitations period

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[4]Since in 1977-78 neither federal nor state legislation prohibited mandatory retirement at age 65, plaintiff's claim here is necessarily directed to the constitutionality of the policy. *See* 29 U.S.C. §§ 621-631, (The Federal Age Discrimination in Employment Act (ADEA)); RSA ch. 354-A:8, VIII (state "Law Against Discrimination). 1978 amendments to the ADEA raised the general upper age limit of protection from 65 to 70, but exempted tenured faculty members from this provision until July 1, 1982. 29 U.S.C. § 631(a), (d). Although not necessary to the procedural disposition of plaintiff's claim, it should be noted that this District has already had occasion to find in the case of a Rhode Island college professor that mandatory retirement at age 65 for tenured faculty survives constitutional scrutiny on the rational basis standard. *McAloon* v. *Bryant College of Business Administration, et al*, 520 F. Supp. 103 (D.N.H. 1981), *citing Lamb* v. *Scripps College*, 627 F.2d 1015 (9th Cir. 1980); *Kuhar* v. *Greensbury-Salem School District*, 616 F.2d 676 (3d Cir. 1980); *Martin* v. *Tamaki*, 607 F.2d 307 (9th Cir. 1979); *Palmer* v. *Ticcione*, 576 F.2d 459 (2d Cir. 1978); *Issarescu* v. *Cleland*, 465 F.Supp.

should apply, it began to run on the date of official notification that plaintiff would be retired under the University's then-existing policy. *See Delaware State College* v. *Ricks*, 449 U.S. 250, 258 (1980).

Plaintiff's contention that his cause of action did not accrue in the fall of 1977, but instead accrued in March 1981, when the Personnel Committee of the Board of Trustees of the University declined to meet with him, is without legal merit. Plaintiff does not allege, and there are no facts to support an inference, that his extended effort to have his case reconsidered was part of any formal administrative appeal process or any formal grievance proceeding. Entertaining a grievance complaining of an employer's decision does not suggest that the earlier decision was tentative, and does not toll the running of the limitations period. *See Ricks, supra*, 449 U.S. at 261; *International Union of Electrical Workers* v. *Robbins & Meyers, Inc.*, 429 U.S. 229 (1976).

Plaintiff's equal protection claims in Counts III and V are based on events in 1977-78. Plaintiff's claim in Count VI that he was denied equal protection and due process in his level of compensation rests on events in the academic years 1967-68 and 1968-69 and in 1977-78. Therefore, any possible causes of action based on these events accrued, at the latest, at the end of 1977-78 academic year, and in the case of events alleged

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657 (D.R.I. 1979). Slip. Op. at 9. Plaintiff in *McAloon* specifically challenged the exemptions in federal and state law which permit mandatory retirement of faculty members at age 65 until July 1, 1982, but the essential question, whether a policy of mandatory retirement for faculty members, based on an age classification, satisfies the rational basis standard, is identical to the scrutiny invited by the instant case. *See Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307 (1976); *Vance* v. *Bradley*, 440 U.S. 93 (1979). Therefore, even if plaintiff's claim in Count II were timely, it would fail to state a claim for relief.

from 1967 to 1969, the limitations period should run from the end of the 1968-69 academic year.

To determine what statute of limitations should apply to cases brought under the civil rights acts, the Court of Appeals for the First Circuit adheres to the well-established practice of looking to the state statute "most analogous" to the particular civil rights cause of action alleged in the complaint. *Runyon* v. *McCrary*, 427 U.S. 160, 180 (1976); *Ramirez de Arellaro* v. *Alvarez de Choudens*, 575 F.2d 315, 318 (1st Cir. 1978), cited for this rule in *Burns* v. *Sullivan*, 619 F.2d 99, 105 (1st Cir. 1980). I rule that in this case the most analogous state law is the New Hampshire "Law Against Discrimination," RSA 354-A, which among other forms of discrimination, specifically covers age discrimination in language tracking the federal ADEA.

Plaintiff's contention that the limitations period in RSA 354-A cannot be applied to him because in 1978 that statute did not provide a remedy for individuals over 65 years of age is baseless. *See Hussey* v. *Sullivan*, 490 F.Supp. 594, 597-98, *affirmed*, 651 F.2d 74 (1st Cir. 1981). In *Hussey* the statute applied as "most analogous" did not apply substantively to plaintiff's claim for non-promotion based on political discrimination, but covered the more serious claim for firing based on political discrimination. The Court noted that it would be incongruous to apply a longer period of limitations to a plaintiff pressing the less serious claim based on the same type of wrongdoing prohibited by statute. *See* 498 F.Supp. 597-98.

In *Burns*, *supra*, the court noted that "generally, the applicable statute of limitations is that which the state would enforce had an action seeking similar relief been brought in state court." 619 F.2d at 105. Plaintiff Dewey's remedies, if any, in state court would have been for age discrimination as provided by RSA 354-A. That plaintiff's claim would have been insufficient to state a claim for relief under the state statute

specifically designed to redress deprivations of the federal right alleged in his claim certainly does not entitle him to take advantage of the longer six-year limitations period of the state's general tort law. *See* RSA 508:4. The argument that the six-year general tort statute of limitations is more analogous than the Law Against Discrimination Statute of Limitations contained in RSA 354-A can hardly be made with a straight face or in good faith. In *Burns*, the court concluded that a six-month limitation contained in an "analogous" state statute was a reasonable time limitation to apply to the plaintiff's claim of denial of equal protection in the form of racial discrimination. The court would have applied the longer general tort statute of limitations *only if the state had not prohibited by statute the deprivation of the federal right at bar. Id.* at 107 (emphasis added). Clearly New Hampshire's "Law Against Discrimination" constitutes a statutory prohibition of the very harm plaintiff Dewey complains of, that is, the deprivation of equal protection in the form of age discrimination. Accordingly, that statute should be considered the "most analogous" state statute for the purpose of determining the applicable limitations period.

Section 9, III of RSA 354-A provides 90 days for aggrieved persons to file complaints of unlawful discriminatory practices, and six months for the attorney general to file such a complaint. Applying either the 90 day or the six month limitation period contained in RSA 354-A, plaintiff's claims in Counts II, III, V, and VI should have been instituted sometime in 1978 or at the latest, in January of 1979. Certain of plaintiff's claims in Count VI, based on events in 1967-68 and 1968-69, would be time-barred even if New Hampshire's general six-year statute of limitations were applied. *See* RSA 508:4. Therefore, I rule that Counts II, III, V, and VI of plaintiff's complaint should be dismissed for lack of subject matter jurisdiction as time-barred under the applicable statute

of limitations. As previously discussed, Counts I and IV should be dismissed for failure to state claims for relief.

Order accordingly.

/s/_____
Andrew A. Caffrey, J.

cc: Mark S. Gearreald, Esq.
Joseph A. Millimet, Esq.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

RICHARD DEWEY,
Plaintiff,

v. CIVIL ACTION
NO. 81-372-C

THE UNIVERSITY OF
NEW HAMPSHIRE, ET AL,
Defendants.

ORDER

May 19, 1982

CAFFREY, J.*

In accordance with memorandum filed this date, it is ORDERED:

1. Count I of plaintiff Dewey's complaint against the University of New Hampshire is dismissed for failure to state a claim for relief.

2. Counts II, III, V, and VI of the complaint are dismissed for lack of subject matter jurisdiction as time-barred under the most analogous state statute of limitations.

3. Count IV of the complaint is dismissed for failure to state a claim for relief.

/s/_____
Andrew A. Caffrey, J.

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* District of Massachusetts, sitting by designation.

cc: Mark S. Gearreald, Esq.
Joseph A. Millimet, Esq.

No. 82-1604

In the Supreme Court of the United States

OCTOBER TERM, 1982

RICHARD DEWEY,
PETITIONER,

v.

THE UNIVERSITY OF NEW HAMPSHIRE, ET AL.,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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I

Questions Presented By Petitioner

1. Did the First Circuit Court of Appeals err in applying to the dismissal for failure to state a claim of the civil rights complaint in this case a standard of review more stringent, (a) than that which it would apply to other, non-civil rights cases, (b) than that which would be applied in other circuits, and (c) than what is called for under the Federal Rules of Civil Procedure and in *Conley* v. *Gibson*, 355 U.S. 41 (1957)?

2. Did not the First Circuit Court of Appeals so far depart from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision, where the numerous paragraphs in the complaint of the petitioner, construed as they must be in the light most favorable to him, set forth sufficient allegations to state claims for relief even under the more stringent standard of review for civil rights cases applied by the First Circuit Court of Appeals?

LIST OF PARTIES

RICHARD DEWEY (retired Professor of Sociology)
PETITIONER

v.

THE UNIVERSITY OF NEW HAMPSHIRE
ALLAN SPITZ (former Dean of the College of Liberal Arts)
EUGENE S. MILLS (former President of the University)
MURRAY STRAUS (Professor of Sociology,
former Department Co-Chairman)
STUART H. PALMER (Chairman, Department of Sociology
and Anthropology)
EVELYN E. HANDLER (President of the University)
GORDON A. HAALAND (Vice President for
Academic Affairs)
ROLAND KIMBALL (Interim Dean of the
College of Liberal Arts)
RESPONDENTS

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In the
Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1604

RICHARD DEWEY,
PETITIONER,

v.

THE UNIVERSITY OF NEW HAMPSHIRE, ET AL.,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

Opinions Below

The opinion of the First Circuit Court of Appeals is officially reported at 694 F.2d 1 (1st Cir. 1982). That opinion and the unreported opinion of the District Court for the District of New Hampshire are set forth in the appendix to the petition for certiorari filed herein.

Jurisdiction

The jurisdictional basis is set forth in the petition for certiorari.

Constitutional and Statutory Provisions Involved

The provisions set forth in the petition for certiorari are adequate.

Statement of the Case

Petitioner's statement of the case incorrectly represents the scope of the affirmance by the First Circuit Court of Appeals. Petitioner says that the appeals court "did not reach the statute of limitations question, affirming dismissal instead [as to Counts III, V and VI (the last, in part only)] upon its finding that the allegations in those counts were similarly too conclusory to state claims for relief." (Petition, 11)

However, the First Circuit's decision plainly states:

> We agree with the district court that Count One of the complaint failed to state a claim upon which relief could be granted and that the remaining counts were time barred. *Dewey* v. *University of New Hampshire*, 694 F.2d 1, 2. See also App. to Pet., 4a.

In addition, petitioner's statement of the case says that the First Circuit agreed the allegations were too conclusory "*under its more stringent standard of pleading for civil rights cases*". (Petition, 11) (emphasis added) This is *not* what the court said. See App. to Pet., 9a. The petitioner's representation creates the erroneous impression that the First Circuit characterized the standard it was applying as "more stringent". Respondents have not been able to find this lan-

guage in the court's opinion. To the contrary, the court refers to its "criterion for minimal factual allegations." See App. to Pet., 9a.

Further, petitioner's statement of the case intimates that petitioner was handicapped by the magistrate's denial of his discovery motions. (Petition, 10) However, petitioner did not argue on appeal that this ruling was erroneous or prejudicial. The issues raised on appeal to the First Circuit, immediately following the order of dismissal below, were (1) Whether the district court was correct in dismissing Count I for failure to state a claim; and (2) Whether the district court was correct in ruling that Counts II, III, V and VI were time barred.

Finally, it should be noted that the portion of the Faculty Handbook containing the University's mandatory retirement policy, referred to in the complaint, Count I, ¶13 (App. to Pet., 18a.), was considered on the motion to dismiss. The district court ruled as a matter of law that the retirement policy was an element of plaintiff's contractual relationship with the University. The retirement policy included provision for extended employment "[u]nder rare and unusual circumstances and at the discretion and on the initiative of the University". Opinion of district court, App. to Pet., 32a, n.1. Petitioner has never challenged this ruling of law.

Summary of Argument

The reasons advanced for granting the petition for certiorari are invalid. Contrary to petitioner's position, modern federal pleading, as outlined in Rule 8(a)(2), F.R.C.P., does contemplate the statement of circumstances, occurrences, and events to give fair notice of what the plaintiff's claim is and the grounds upon which it rests. Although the federal rulemakers, for the sake of flexibility and clarity, rejected the code phrase "cause of action", Rule 8(a)(2), by its own terms, does require that the complaint show the court *the pleader is entitled to*

relief. Petitioner erroneously assumes the court was obligated to accept his conclusory and subjective characterizations unsupported by factual allegations.

Under the "fair notice" standard, what constitutes sufficient notice naturally varies from case to case. Courts should enjoy reasonable latitude and discretion to define sufficient notice in each case in order to achieve the objectives of modern federal pleading. The refinement of distinctions—which would be the inevitable results were certiorari granted to review lower courts' determinations of pleading sufficiency in cases such as the instant one—would destroy the very flexibility intended by the federal rulemakers.

It is reasonable to require in cases where motivation is a critical element of the pleader's claim that the allegations give rise to the inference of proscribed motivation. Likewise, where the First Amendment is asserted as the basis for relief, it is reasonable to require that the allegations indicate the subject matter of the allegedly protected speech. In the instant case, the First Circuit did not require detailed pleading of evidentiary facts. The court's expectations were reasonable, consistent with the "fair notice" standard of Rule 8(a)(2), and in harmony with other circuits' expectations generally.

A 1968 district court decision from the Second Circuit, purporting to carve an exception to "notice pleading" for civil rights cases, does not signal a current conflict in the circuits calling for Supreme Court action. The First Circuit's decision in the instant case is within the continuum of decisions requiring more than unsupported, vague and conclusory allegations to state a claim for deprivation of federal rights. No ground for certiorari exists here.

Argument

I. Petitioner's Contention That The First Circuit Departed From The Federal Pleading Standard Of Rule 8(a)(2) In This Civil Rights Case Is Based Upon The Perennial Misconception That Information To Support A Claim Need Not Be Averred Under The Rule.

The simplified pleading requirements of Rule 8, F.R.C.P., have not done away with the plaintiff's obligation to furnish some detailed information in support of the claim being presented so that the defendant, and the court, can obtain a fair idea of what the plaintiff is complaining and can see that there is some legal basis for recovery. *Davis* v. *Passman*, 442 U.S. 228, 237 n.15, citing 2A *Moore's Federal Practice*, ¶8.13, at 1704-05 (2d ed. 1975); *see Conley* v. *Gibson*, 355 U.S. 41, 48 (1957).

Professors Wright and Miller have noted that even *Conley, supra*, the leading case discussing the philosophy of modern federal pleading, indicates "that the rules do contemplate a statement of circumstances, occurrences, and events in support of the claims being presented." 5 *Wright & Miller, Federal Practice and Procedure* (hereinafter "*Wright & Miller*"), §1215 at 112. Moreover, whether the pleading need present a complete formal cause of action or not, it "*must contain either direct allegations on every material point necessary to sustain a recovery on any legal theory*, even though it may not be the theory suggested or intended by the pleader, *or contain allegations from which an inference fairly may be drawn that evidence on these material points will be introduced at trial.*" *Id.* §1216 at 121-23. (emphasis added)

As one court has stated:

> [I]t seems to be the purpose of Rule 8 to relieve the pleader from the niceties of the dotted *i* and the crossed *t*

> and the uncertainties of distinguishing in advance between evidentiary and ultimate facts, while still requiring, in a practical and sensible way, that he set out sufficient factual matter to outline the elements of his cause of action or claim, proof of which is essential to his recovery... Therefore, if a pleader cannot allege definitively and in good faith the existence of an essential element of his claim, it is difficult to see why this basic deficiency should not be exposed at the point of minimum expenditure of time and money by the parties and the court. *Daves* v. *Hawaiian Dredging Co.*, 114 F. Supp. 643, 645 (D. Hawaii 1953)

In 1952, a resolution was adopted at the Ninth Circuit Judicial Conference providing that Rule 8(a)(2) should be amended to require a pleading to contain "a short and plain statement of the claim, showing that the pleader is entitled to relief, *which statement shall contain the facts constituting a cause of action.*" (Proposed addition in italics) *See generally* Discussion, Claim or Cause of Action, 13 F.R.D. 253 (1951). The proposal was, in part, a reaction to the opinion of Judge Charles E. Clark, the principal draftsman of the federal rules, in *Dioguardi* v. *Durning*, 139 F.2d 774 (2d Cir. 1944).

The Ninth Circuit's recommendation was referred to this Court's Advisory Committee on the Civil Rules. In the Committee's Report of October, 1955, it declined to amend Rule 8(a)(2) and responded thus to its critics:

> *Note.* Rule 8(a)(2) is retained in its present form. This Note is appended to it in answer to various criticisms and suggestions for amendment which have been presented to the Committee.
>
> *The criticisms appear to be based on the view that the rule does not require the averment of any information as to what has actually happened.* That Rule 8(a) envisages

> the statement of circumstances, occurrences, and events in support of the claim presented is clearly indicated. . . . . The intent and effect of the rules is to permit the claim to be stated in general terms; the rules are designed to discourage battles over mere form of statement and to sweep away the needless controversies which the codes permitted that served either to delay trial on the merits or to prevent a party from having a trial because of mistakes in statement. *The decision in Dioguardi* v. *Durning*, 139 F.2d 774 (2d Cir. 1944), to which proponents of an amendment to Rule 8(a) have especially referred, *was not based on any holding that a pleader is not required to supply information disclosing a ground for relief.* The complaint in that case stated a plethora of facts and the court so construed them as to sustain the validity of the pleading.
>
> . . . .
>
> It is accordingly the opinion of the Advisory Committee that, as it stands, the rule adequately sets forth the characteristics of good pleading, does away with the confusion resulting from the use of "facts" and "cause of action"; and *requires the pleader to disclose adequate information as the basis of his claim for relief* as distinguished from a bare averment that he wants relief and is entitled to it. (emphasis added)

Professors Wright and Miller have lamented the adoption of the label "notice pleading" to describe modern federal pleading since it leads to the view rejected in the Advisory Committee's 1955 Report, namely, that federal pleading "does not require the averment of any information as to what has actually happened." These commentators suggest that:

> If a label is needed to distinguish pleading under the rules from that of the codes and the common law, "modern

> pleading" or "simplified pleading" would be more appropriate. *Wright & Miller*, §1202 at 63.

The commentators acknowledge that in *Conley, supra*, this Court referred to "simplified 'notice pleading' ", but they emphasize that this Court required the complaint to give defendant "fair notice of what the plaintiff's claim is and the grounds upon which it rests." 355 U.S. at 48, quoted in *Wright & Miller* §1202 at 63-64, §1215 at 112.

Judge Clark, himself, in a decision subsequent to his controversial opinion in *Dioguardi, supra*, stated:

> It is too often overlooked that federal pleading is still issue pleading, presenting a definite issue for adjudication; the use of the term 'notice pleading'—which was rejected by the rule-makers and never employed by them—is prejudicial to a proper operation of the federal system, since it suggests the absence of all pleadings and the necessity of some substitute by way of pre-pre-trial. *Padovani* v. *Bruchhausen*, 293 F.2d 546, 550-51 (2d Cir. 1961).

Professors Wright and Miller state:

> What constitutes a short and plain statement must be determined in each case on the basis of the nature of the action, the relief sought, and the respective positions of the parties in terms of the availability of information and a number of other pragmatic matters. *Wright & Miller*, §1217 at 127.

See also 2A *Moore's Federal Practice*, ¶8.13 at 8-124, 125 (2d ed. 1983); *Mountain View Pharmacy* v. *Abbott Laboratories*, 630 F.2d 1383, 1386-87 (10th Cir. 1980); *City of Gainesville* v. *Florida Power and Light Co.*, 488 F. Supp. 1258, 1263-64 (S.D. Fla. 1980).

The First Circuit in the instant case cited the following decisions, which describe the pleader's obligation in each case as follows:

(1) *O'Brien* v. *DiGrazia*, 544 F.2d 543, 546 n.3 (1st Cir. 1976).

> We are not holding the pleader to an impossibly high standard; *we recognize the policies behind rule 8 and the concept of notice pleading.* A plaintiff will not be thrown out of court for failing to plead facts in support of every arcane element of his claim. But *when a complaint omits facts that, if they existed, would clearly dominate the case, it seems fair to assume that those facts do not exist.* (emphasis added).

(2) *Kadar Corp.* v. *Milbury*, 549 F.2d 230, 233 (1st Cir. 1977).

> While a complaint need only set out "a generalized statement of facts", there must be enough information "to outline the elements of the pleaders' claim" [footnote omitted]. Wright & Miller, *Federal Practice and Procedure:* Civil §1357. More detail is required than a plaintiff's bald statement "that he has a valid claim of some type", and courts do "not accept conclusory allegations on the legal effect of the events plaintiff has set out if these allegations do not reasonably follow from his description of what happened...." *Id.*

(3) *Fisher* v. *Flynn*, 598 F.2d 663, 665 (1st Cir. 1979).

> Complaints based on civil rights statutes must do more than state simple conclusions; they must at least outline the facts constituting the alleged violation. [citations omitted] Paragraphs 15, 17 and 18 are plainly of *the invalid conclusory variety merely reflecting plaintiff's subjective characterization of defendant's motive and actions.* (emphasis added)

(4) *Leonardo* v. *Moran*, 611 F.2d 397, 398 (1st Cir. 1979). However, Leonardo pleaded no facts to tie his transfer to maximum security to his exercise of his right of access to the courts. Plaintiff omitted such basic facts as the nature of his "grievances" before the district court and whether they were directed at prison officials. . . . Nor did the complaint allege that defendants communicated a threat of revenge to Leonardo. . . . Finally, Leonardo alleged that his transfer was due "in part" to his having filed grievances with the court. *Such ambiguity about defendants' motivation—a crucial element of his case* . . . —together with the other deficiencies discussed *supra cause this complaint to fall short of even the minimum factual recitations* allowed complaints of this nature. . . . (emphasis added)

(5) *Glaros* v. *Perse*, 628 F.2d 679, 684 (1st Cir. 1980).

In a case allegedly involving surveillance, we do not think it unrealistic or unfair to expect a plaintiff to describe briefly in his complaint the activities of each defendant said to have surveilled him and how his constitutional rights were impinged upon. Indeed, this is necessary to stating a claim because all surveillance is not *per se* violative of constitutional rights. . . .

. . . . Missing were a description of the means used in surveilling and monitoring Glaros, the nature of the alleged intrusion, and in some instances the location and timing of such activities. *Not enough was said about the conduct of the defendants . . . to distinguish their behavior from that of an ordinary nosey neighbor.* . . . [T]here was no outline of how those defendants' conduct violated any of Glaros' constitutional rights. (emphasis added)

In the instant case, the First Circuit summarized its requirements generally as follows:

> We require more than conclusions or subjective characterizations. We have insisted on at least the allegation of a minimal factual setting. It is not enough to allege a general scenario which could be dominated by unpleaded facts.... *Dewey, supra*, 694 F.2d at 3. See also App. to Pet., 7a.

These requirements are consistent with the "fair notice" standard of Rule 8(a)(2). In none of the cases has the court required any specific technical form of pleading, or required any statement of detailed evidentiary facts. In *O'Brien* v. *DiGrazia, supra*, the court expressly recognized the concept of "notice pleading". Nowhere does the court purport to go beyond the standard of Rule 8(a)(2) or to substitute a more stringent standard for civil rights cases. The decisions cited reflect the recognized principle that the appropriate level of specificity depends on the issue in question.

Finally, the First Circuit's statement of what is required where motivation is a key element of the claim is consistent with this Court's holding in *Snowden* v. *Hughes*, 321 U.S. 1, 10 (1944).

> The lack of any allegations in the complaint here, tending to show a purposeful discrimination between persons or classes of persons is not supplied by the opprobrious epithets "wilful" and "malicious" applied to the Board's failure to certify petitioner as a successful candidate, or by characterizing that failure as an unequal, unjust and oppressive administration of the laws of Illinois. . . . Such allegations are insufficient under our decisions to raise any issue of equal protection of the laws....

Petitioner's contention here, that the First Circuit's standard for pleading in civil rights cases is more stringent than called for under the federal rules, typifies the perennial misconception that the federal pleading rules do not require the averment of any information as to what has actually happened. This misconception should be recognized for what it is and rejected as a basis for certiorari.

II. Petitioner's Contention That The First Circuit Has Created An Exclusive Pleading Standard For Civil Rights Cases Is A Misstatement Which Ignores The Nature Of The Individual Claims For Which Greater Specificity Is Required For Sufficient Notice.

Petitioner's other contention, that the First Circuit applies a more stringent pleading standard in civil rights cases than in other types of cases, is equally ill-founded, and for the reason already set forth in Part I, *supra:* the degree of specificity needed to satisfy the "fair notice" standard depends on the issue in question.

The principle, of course, is well established that the simplified pleading requirements of Rule 8, F.R.C.P., apply to all federal civil actions, regardless of their size or complexity. *Nagler* v. *Admiral Corporation*, 248 F.2d 319 (2d Cir. 1957). However, this principle "does not mean that all federal pleadings are intended to exhibit the same degree of specificity." *Wright & Miller*, §1221 at 151.

> In some contexts the pleader may be obliged to provide a lengthier narrative than in others because of peculiarities in the factual or legal background of the case. *Id.*

In the context of civil and constitutional rights, the difference between a constitutional deprivation, a contractual violation, or no legally cognizable injury at all must be deter-

mined from the circumstances in each case. Whether a federal right is implicated is often a factor of motivation, such as retaliation or discriminatory intent. For example, there is no federally protected right *per se* in holding a professorship at a state university. There is no blanket federal protection against erroneous, ill-advised or adverse employment decisions affecting state employees, but an improper motive can impinge on constitutionally protected rights. *Bishop* v. *Wood*, 426 U.S. 341, 349-50 (1976). "Whatever may be a teacher's rights of free speech, the interest in holding a teaching job at a state university, simpliciter, is not itself a free speech interest." *Board of Regents* v. *Roth*, 408 U.S. 564, 575 n.14. Disagreements between professors and their deans are not afforded routine First Amendment protection. *See Pickering* v. *Board of Education*, 391 U.S. 563 (1968); *Mt. Healthy City Board of Ed.* v. *Doyle*, 492 U.S. 274 (1977); *Connick* v. *Myers*, U.S. No. 81-1251 decided April 20, 1983, 51 LW 4436.

Therefore, in civil rights cases, in order to show that the pleader has a claim entitling him to relief, it may be necessary in some contexts to provide a lengthier narrative. In situations where *per se* violations are not involved, where the official action complained of is routine, innocuous on its face, or within official discretion, the allegations must be sufficient to overcome the presumption of regularity. Where motivation is a key element of the pleader's claim for relief, the allegations must be sufficient to raise the inference of improper motive. Otherwise, no federal claim is stated. *Fisher* v. *Flynn*, *supra*; *Leonardo* v. *Moran*, *supra*; *Glaros* v. *Perse*, *supra*. *See also McDonald* v. *Hall*, 610 F.2d 16, 19 (1st Cir. 1979) (dissenting opinion):

> Claims involving proof of intent do not, to be sure, lend themselves easily to summary disposition. . . . . On the other hand, as the right to transfer is a clearly established part of prison officials' authority, *Montanye* v. *Haymes*,

> 427 U.S. 236. . . (1976), I think it only *reasonable to require that sufficient factual background be provided to support a claim that a transfer was unconstitutionally motivated. Requiring the allegation of facts and circumstances giving at least minimal shape and credibility to the First Amendment claim would appear necessary to overcome the usual presumption that inmate transfer is a rightful exercise of prison officials' broad discretion* to relocate prisoners at will. (emphasis added)

In view of the flexibility intended by the modern rules, defining what is necessary to state a claim showing that the pleader is entitled to relief should be largely a matter for the discretion of the trial court in each instance. The fact that the nature of the claim being presented requires more detail to constitute sufficient notice in the court's view does not mean that a more stringent standard is being applied to the category of cases generally.

III. Petitioner's Identification Of A Conflict Between The Circuits Is A Question Of Degree—Not A Substantial Or Sharp Conflict Calling For Resolution By This Court.

Petitioner's argument that there exists a conflict between the circuits about the pleading standard for civil rights cases is borrowed from 2A *Moore's Federal Practice*, ¶8.17 [4.-1] at 8-175 through 8-178. (Petition, 14) Moore's treatise bases the asserted conflict on *Valley* v. *Maule*, 297 F. Supp. 958, 960-61 (D. Conn. 1968); certain decisions from the Third Circuit, which call for factual specificity in civil rights pleadings; and *United States* v. *Gustin-Bacon Div., Certain-Teed Products Corp.*, 426 F.2d 539, 542 (10th Cir. 1970), *cert. denied*, 400 U.S. 832 (1970).

In *Gustin-Bacon*, the Tenth Circuit rejected reversion to "a detailed pleading of evidentiary matters" in a "pattern or practice" action brought by the United States Attorney General under 42 U.S.C. §2000e-6(a). The court stated at the outset:

> The single question on appeal is what Congress intended by requiring that complaints filed under 42 U.S.C.A. §2000e-6(a) must set forth "facts pertaining to such pattern or practice." *Id.* at 540.

Considering the relationship of the specific statutory pleading provision with federal Rule 8(a), the court concluded:

> We find no suggestion in the Civil Rights Act of 1964...which supports appellees' contention that Congress intended to require the Attorney General to revert to a detailed pleading of evidentiary matters.
>
> ...[W]e think Congress meant that the Attorney General's belief...must be reflected on the [face] of the complaint. And that this may be done by a *pleading of fundamental facts* of the character herein alleged. *Id.* at 542-43. (emphasis added)

Gustin-Bacon, *supra*, thus does not reject the requirement for pleading *facts* in support of a claim of racial discrimination. Indeed, the Tenth Circuit's holding is cited with approval in *Marshall* v. *Electric Hose and Rubber Company*, 65 F.R.D. 599, 605 (D. Del. 1974). In *Marshall*, the district court finds the Third Circuit pleading requirements for civil cases; the "fair notice" standard of Rule 8(a)(2); and the holding of *Gustin-Bacon*, *supra*, all in harmony about the degree of specificity in pleading required. 65 F.R.D. at 605. This conclusion by the Delaware district court refutes the view of the

supposed "conflict" in the circuits described in Moore's treatise and set forth by the petitioner here. (Petition, 14-15)

Some cases may require more specificity than others, or employ language indicative of varying degrees of stringency; but there is no significant difference in the courts' application of the "fair notice" standard which would call for certiorari, particularly in the instant case from the First Circuit, whose decisions are acknowledged by Moore's treatise itself to fall within the great majority of cases rejecting unsupported, vague, or conclusory allegations. 2A *Moore's Federal Practice*, ¶8.17 [4.-1] at 8-178 and n.11 (2d ed. 1983).

Respondents' survey of circuit cases bears out this observation that vague and conclusory allegations will not survive motions to dismiss. *See, e.g.*, Second Circuit - *Ostrer* v. *Aronwald*, 567 F.2d 551 (2d Cir. 1977); *Albany Welfare Rights Org. Day Care Ctr., Inc.* v. *Schreck*, 463 F.2d 620, 622-23 (2d Cir. 1972), *cert. denied*, 410 U.S. 944 (1973);

Fourth Circuit - *Johnson* v. *Mueller*, 415 F.2d 354 (4th Cir. 1969); *Hagerstown Kitchens, Inc.* v. *Bd. of Cty. Com'rs., Etc.*, 547 F. Supp. 46, 48 (D. Md. 1982); *Opara* v. *Modern Mfg. Co.*, 21 F.R. Serv. 2d 499, 501 (D. Md. 1975);

Fifth Circuit - *Hanson* v. *Town of Flower Mound*, 679 F.2d 497, 504 (5th Cir. 1982); *Burnett* v. *Short*, 441 F.2d 405, 406 (5th Cir. 1971);

Sixth Circuit - *Place* v. *Shepherd*, 446 F.2d 1239, 1244 (6th Cir. 1971); *Blackburn* v. *Fisk*, 443 F.2d 121, 124 (6th Cir. 1971); *Kurzawa* v. *Mueller*, 545 F. Supp. 1254, 1262 (E.D. Mich. 1982);

Seventh Circuit - *Jafree* v. *Barber*, 689 F.2d 640, 643, 644 (7th Cir. 1982); *Cohen* v. *Illinois Institute of Technology*, 581 F.2d 658, 663 (7th Cir. 1978), *cert. denied*, 439 U.S. 1135 (1979);

Eighth Circuit - *Kaylor* v. *Fields*, 661 F.2d 1177, 1183 (8th Cir. 1981); *Anderson* v. *Sixth Judicial District Court*, 521 F.2d 420, 421 (8th Cir. 1975);

Ninth Circuit - *Hutchinson* v. *U.S.*, 677 F.2d 1322, 1327-28 (9th Cir. 1982); *Williams* v. *Gorton*, 529 F.2d 668, 670-71 (9th Cir. 1976);

Tenth Circuit - *Coopersmith* v. *Supreme Court, State of Colorado*, 465 F.2d 993, 994 (10th Cir. 1972); *Martinez* v. *Winner*, 548 F. Supp. 278 (D. Col. 1982);

D.C. Circuit - *Lamont* v. *Forman Brothers, Inc.*, 410 F. Supp. 912, 915 (D. D.C. 1976); *cf. Richardson* v. *Rivers*, 335 F.2d 996, 999 (D.C. Cir. 1964); *Pauling* v. *McElroy*, 278 F.2d 252, 254 (D.C. Cir. 1960), *cert. denied*, 364 U.S. 835 (1960).

Moreover, it is noteworthy that at least two recent Third Circuit decisions place that circuit squarely within the "fair notice" tradition of Rule 8(a)(2). In *United States* v. *City of Philadelphia*, 644 F.2d 187, 204 (3rd Cir. 1980), the court states:

> The rule is well established in this circuit that a civil rights complaint that relies on vague and conclusory allegations does not provide "fair notice" and will not survive a motion to dismiss. [footnote omitted] We require a modest degree of factual specificity in civil rights complaints. . . .

The court goes on to identify important goals served by this requirement, including "fundamental principles of comity and federalism." *Id.* at 206. Although *Valley* v. *Maule, supra*, is quoted in *City of Philadelphia*, the "exception to the general rule of notice pleading", which *Valley* purported to recognize for civil rights cases in 1968, is not adopted by the Third Circuit.

In *Ross* v. *Meagen*, 638 F.2d 646, 650 (3d Cir. 1981), the Third Circuit says it has "demanded that a civil rights complaint contain a *modicum of factual specificity*, identifying the particular conduct of defendants that is alleged to have harmed the plaintiffs." (emphasis added) This is consistent

with the practice in all circuits. The Connecticut district court's characterization of the pleading requirements there as an exception to, rather than an illustration of, the practice under Rule 8(a)(2) in civil rights cases is mere nomenclature. *Valley's* so-called "exception to the general rule . . ." has not been adopted in either its own Second Circuit or elsewhere. It offers no foundation for certiorari.

IV. Petitioner's Complaint Was Properly Dismissed For Failure To Satisfy The "Fair Notice" Pleading Standard Applied By The First Circuit.

Petitioner asserts that the numerous allegations in Counts I, III, V and VI were sufficient to state claims for relief. (Petition, 16) The First Circuit found them bland and too conclusory to state claims for deprivation of First Amendment speech rights and Fourteenth Amendment rights of equal protection and due process.

The First Circuit also *agreed the claims in Counts III, V and VI*, as well as Count II, *were time barred* under the most analogous state statute of limitations.

> We agree with the district court that Count One of the complaint failed to state a claim upon which relief could be granted and that the remaining counts were time barred. *Dewey, supra*, 694 F.2d at 2. See also App. to Pet., 4a.

The statute of limitations issue has not been raised in the petition for certiorari filed herein. In view of this, and the First Circuit's disposition of Counts III, V and VI on timeliness as well as insufficiency grounds, only petitioner's contention that Count I was not insufficient will be addressed by respondents here.[1]

[1] The statute of limitations bar was not raised against the First Amendment claim in Count I below. The question of whether Count I was timely has thus never been reached.

Count I was amended twice by petitioner. Indeed, the most striking aspect of this case has been the petitioner's persistent unwillingness to furnish more information about the alleged retaliation by the defendant Spitz, Dean of the College of Arts and Sciences. Both the court of appeals and the district court commented upon this curious reluctance to furnish more details in support of the First Amendment claim.

The First Circuit stated in its opinion:

> In the instant case the complaint alleges that plaintiff, over a period of six years prior to the critical decision in the fall of 1977, spoke on a number of issues of public interest involving the University, disagreeing with defendant Spitz. *Despite the fact that nearly eight months elapsed from the filing of the complaint* (July 29, 1981) *to the filing of a second motion to amend it* (March 12, 1982), *during which time the lack of specificity in the complaint had been vigorously challenged, there was no effort to fill in the gaps as to the nature of the issues discussed*, the particular occasions, their recentness or remoteness, the position of the University, the importance of the controversy, the prominence or lack of prominence of plaintiff's comments. *Instead, the allegations described what we assume would be true of any thinking and reasonably articulate faculty member during the decade of the seventies.*
>
> . . .
>
> . . .Not only is it apparent that two presidents, a vice president, a dean, and the personnel committee of the Board of Trustees, as to none of whom is there an allegation of a controversy with plaintiff, consistently adhered to the decision not to extend to plaintiff post-65 employment, but there is the conceded policy of the University, set forth in the Handbook, that only in "rare and unusual circumstances" and at the discretion of the University,

would employment be continued for a faculty member who had reached 65. See App. to Pet., 8a. (emphasis added)

The district court described the pleading deficiency as follows:

> Plaintiff's allegations do not raise the inference that defendant Spitz should have supported the plaintiff's retention beyond the mandatory retirement age under the University's existing policy, and without more, do not raise the inference that a mandatory policy was discriminatorily applied. As plaintiff himself alleges, the "decision" to apply the policy was supported and upheld by higher levels of administration. The usual presumption is that the retirement policy in effect at the time was a rightful exercise of the University's Board of Trustees' discretion in faculty employment matters. [citations omitted]
>
> *Nor do plaintiff's allegations, even as twice-amended* [footnote omitted], *raise the inference that he was retaliated against for exercising his First Amendment rights.* To state a claim for relief plaintiff must allege facts or circumstances which give at least some rudimentary shape to his claim that defendant Spitz "acted knowingly, maliciously, and out of retaliation against the aforementioned exercise by plaintiff of his First Amendment rights." [citations omitted]
>
> [That] plaintiff expressed views on "University matters" of "public concern" that were contrary to those of defendant Spitz is merely plaintiff's subjective and conclusory assessment of the nature and legal effect of his alleged disagreement with defendant Spitz; *even after an opportunity to amend his complaint to meet defendant's specific arguments on the motion to dismiss, plaintiff*

> ***has still failed to mention the subject matter of his views or outline any events or circumstances from which his legal conclusions reasonably follow.*** See App. to Pet., 36a-37a. (emphasis added)

In the petition for certiorari, petitioner represents that "the thrust of [the] amended complaint is that the entire on-paper policy of the University regarding retirement . . . was in fact no longer being observed at the time of petitioner's forced retirement." (Petition, 18) This assertion was not, however, made in the complaint, even as twice-amended. It is an overstatement for petitioner to make this representation, and obviously it was too late to amend the complaint in argument to the First Circuit, or now in a petition for certiorari. *See Hanson* v. *Town of Flower Mound*, *supra*, 679 F.2d at 504 (5th Cir. 1982).

The last amended version of the allegations themselves stop just short of making such an assertion that the policy was no longer being followed. (See ¶26, Motion for Leave to Further Amend Compl., App. to Pet., 29a.) Further, as petitioner himself alleged, the "decision" to apply the policy was supported and upheld by higher levels of administration, including the personnel committee of the Board of Trustees, as to none of whom was there an allegation of any controversy with petitioner.

The courts are entitled to draw inferences from complaints which fall short of making plain, direct allegations on key elements of the claim. *O'Brien* v. *DiGrazia*, *supra*, 544 F.2d at 546 n.3 (when complaint omits facts which would dominate the case, it is fair to assume those facts do not exist). *See also Jenkins* v. *McKeithen*, 395 U.S. 411, 425-26 (1969), (dissenting opinion of Justices Harlan, Stewart and White) (only plausible inference from omission of certain allegations was that appellant had no facts to support them).

In the instant case, petitioner has not raised the issue that discovery was necessary to supply the omitted factual allegations. Moreover, such an assertion would be entitled to no credence since petitioner must have known the matters about which he and the dean allegedly disagreed. *Kaylor, supra*, 661 F.2d at 1184.

The First Circuit's holding that Count I failed to state a claim for relief was reached after careful consideration of the circumstances of this case, in light of "the criterion of minimal factual allegations that we have consistently required." (App. to Pet., 9a.) The petition fails to demonstrate that the court departed from the accepted and usual course of judicial proceedings so as to call for certiorari in this case.

Conclusion

For all the foregoing reasons, respondents submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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